WOMEN EMPOWERMENT THROUGH LEGISLATIONS IN THE AREA OF PERSONAL LAWS: A SOCIO-LEGAL STUDY OF SELECTED LEGISLATIONS IN POST INDEPENDENT INDIA

ABSTRACT

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

In

Law

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2012

ABSTRACT

In India almost half of the Indian populations are women. They have always been discriminated against and have suffered and are suffering discrimination. Even though self-sacrifice and self-denial are their nobility and virtue, yet they have been made the victims of all inequalities, indignities, inequities and discriminations, from time immemorial. These are some of the factors that prompted the legislature to make various laws to give the women their due share. The Constitution of India prohibits discrimination on the ground of sex. This prohibition of gender-based discrimination has been given the status of a fundamental right. Various other laws have been enacted to deal with the personal matters like marriage, divorce, succession etc. with regard to the women. The criminal law also contains numerous provisions to deal with the crimes committed against women; enactments like the Dowry Prohibition Act supplement the existing criminal laws to combat the evil of dowry. Number of labour and industrial laws provide for the protection and welfare of the women, which include maternity benefit, prohibition of employment of women in dangerous activities and creche facility for the children of working women. In order to curb the immoral and anti-social practice of prostitution, the Immoral Traffic (Prevention) Act has been enacted. The female foeticide and infanticide have assumed dangerous proportions and the determination of sex of the foetus which became possible due to the advanced scientific inventions, abetted the commission of these inhuman acts. The Parliament has passed the Pre-natal Diagnostic Techniques (Regulation & Prevention of misuse) Act, 1994 to arrest this undesirable trend. These legislative

measures aforementioned are only illustrative in nature and not at all exhaustive.

The Parliament of India has realized the importance of a monitoring institution to examine and investigate all the matters relating to the safe guards provided for woman under the Constitution and other Laws, This realization has led to the enactment of the National Commission for Women Act, 1990 which came into force with effect from 31st January, 1992. Though this Commission consists of a Chairperson and five members nominated by the Central Government, has been entrusted with the task of presenting to the Central Government the problems of women, deprivation of women's rights, and the reports of the progress of the development of woman under the Union and any State, though it has not been given Constitutional Status. However, this body has been burdened with the laborious responsibility of reporting to the government as to the efficacy and effective implementation of the safeguards for improving the conditions of woman by the Government, and for monitoring the socio-economic development of woman in all walks of their life. Unfortunately, the Commission can make only recommendations and send the same to the respective authority for action. It has no Judicial Powers for making it an effective instrument for providing relief to woman in distress. Mr. Justice V. R. Krishna Iyer aptly remarked that a National Commission for Women has "hardly any teeth or nail". It is good development that now the Commission has been given the Judicial Powers and also conferred the Constitutional status. Indian women are becoming more and more conscious of their constitutional and statutory rights. This consciousness has awakened in them a sense of urgency in

experiencing equality and social justice. Without equality and social justice there cannot be democracy in the real sense.

The Universal Declaration of Human Rights adopted by United Nations General Assembly in 1948 claims that "All human beings are born free and equal in dignity and rights." For egalitarianism, men and women are equal before the law and there must be 'equality of opportunity'.

Equality provides social justice. It makes a full human being. The holistic development of man and woman is impossible without social justice. It protects the weak and limits the powers of the strong and acts for the welfare of every one.

The discrimination being a female is obvious in the Indian Society, such as the lower life expectancy, minimum education, poorly paid jobs, lower status expectations and very few rewards than men in comparable situations. The process of selection and elimination operating through a complex system of institutional network results in the narrowing down of options for women. Sex role differentiation and ideological assumptions about "Women's place" is linked to the unequal distribution of resources, rewards, rights and authority between men and women which in turn influence patterns of family and work life.

The Hindu law-givers did not permit women to inherit property. So a revolutionary change took place with the passage of Married women's Property Act of 1874 which widened the scope of *Streedhana* and the money she acquired through her artistic and literary skills. Side by side the *Streedhan*-movable property which was given to the woman by her

parents or husbands also remained intact. The women's lot needed amelioration was the prevailing view and the reformers wanted women to return to the *Vedic* glory and other placed definite plans to eradicate their problems. Some reformers, like Dayanand Saraswati, gave a severe shock to the traditional society when launched the *Suddhi* movement and attempted to take back women in the Hindu fold who were converted to Islam or Christianity. Other reformers argued in favour of holistic development programme. Yet others fought for official intervention and social legislations. All reformers had to face opposition from the reactionaries in Hindu society.

Since Independence, All India Women's Conference became interested in constructive work and left its agitational attitude of pre-independence era. Its activities since Independence led to the enactment of social legislations with reference to women. Some significant ones are: Women's Legal Rights, 1952; the Suppression of Immoral Traffic in Women and Children Act, 1954; The Special Marriage Act, 1954; the Hindu Marriage Act, 1955; the Hindu Marriage and Divorce Act, 1956; the Hindu Adoption and Maintenance Act, 1956; the Hindu Minority and Guardianship Act, 1956; Interstate Succession Act, 1956; the Orphanages and Widow Home Act; The Orphanages and other charitable homes (supervision and control) Act, I960; and the Dowry Prohibition Act, 1961.

The position of women reflects the cultural attainment of a society. A major index of modernization of any society is the position of its women *vis-à-vis* men. The more balanced the opportunity structure for men and women, the higher the status enjoyed by women in the

society. However, the status of women suffered a setback both on the religious and Philosophic as also on the socio-legal plane.

Originally a female under the Roman law had very little of personal and proprietary independence, but gradually she extricated herself out of it. According to Sir Henry Maine, there were three modes in which marriage might be contracted under Roman usage: '*conferreatio*' involving a religious solemnity and, '*coemptio*' and '*usus*', involving observance of certain secular formalities. On marriage, the husband acquired a number of rights over the person and property of his wife which was on the whole in excess of such as are conferred on him in any system of modern jurisprudence. However, at the most splendid period of Roman greatness, these three forms of marriage fell into disuse and were founded on the modification of the lower form of civil marriage.

Hindu law and customs were extremely unfavorable to woman. She was treated as inferior to man. The great law- giver Manu says that "Day and night must women be held by their protectors in a status of subjection". It is true that after some time life interest in the property was given to them under the name of *stridhan*, but because the custom of *suttee* came into practice that right was of no practical value. A window burnt herself alive with the dead body of her husband and that horrible custom was the most gloomy picture of the position that women held in the social economy of the Hindu life. Women were some times made the wife of several brothers at the time. She was sometimes put on the gambling stake and lost. Even up to the other day there was no limit to polygamous marriage in Hindu society. A Hindu widow could not adopt a son unless her deceased husband had left her

permission to do so. She could not get any alienable right in property. She could be married without her consent when only a child of four or five years of age. Marriage was viewed as a gift of the bride by her father or other guardian to the bride-groom. As a daughter she was only entitled to expenses of her marriage from her father's estate. She had no right to succession along with her brother. No girl was allowed to be adopted by Hindus. Remarriage was not allowed. Once married, she could not get divorce. Her status in the society was negligible. A father was never expected to eat at her husband's house, and so on.

The whole fabric of Christianity rests upon the criminality of woman. If Eve had not shown the frailty of going astray, if she had not tempted innocent, child like Adam, sin would not have become inherent inhuman nature, and no saviour would have been required no spilling of human blood would have been needed to "cleanse". Jesus said that he had come to fulfill the law, so he accepted "Thy desire shall be to thy husband and he shall rule over thee" as the maxim of a married life for women. Under English law, wife had no independent identity. The notion of the unity of the personalities of husband and wife prevailed. She had no separate legal existence. She was incapable of holding separate property. So neither the husband could make any grant in her favour, nor could she bring any action for redress against anybody without his consent. The disabilities were subsequently modified by the Court of Equity And The Married Women's Property Act.

The women in Pre-Islamic Arabian Peninsula were treated as chattels. They enjoyed no legal rights. In youth, they were the property of their fathers and after marriage the husband became their lord and master. A woman was not a free agent in contracting marriage. It was the right of

her father, brother, cousin or any other male guardian to give her in marriage, whether she was old or young, widow or virgin to whomsoever he chose. Her consent in marriage was not required.

Polygamy was prevalent, and there was no restriction as to the number of wives one could have. Along with the formal marriage, group marriage, flag marriage prostitution, marriage by barter and temporary marriage ('*muta*') were in vogue. In regular marriage, dower formed a part of the marriage contract. In some cases the guardians of the girls used to take the dower for themselves. Imputation of unchastity used to deprive a woman of her dower. Husband's power as regards divorce was unrestricted. He could divorce his wife as many times as he liked and could contract fresh alliance of marriage with her every time. Even on pronouncement of divorce, it depended on his discretion whether the marriage was dissolved or not.[1]

It strictly abrogated the last three forms of marriage. Prostitution was abolished. Temporary marriage (*muta*) was forbidden after the tenth year of *Hijra*. Polygamy was restrained by a *Qura'nic* injunction limiting the number of wives up to four at a time with a note of caution: "If you (husband) cannot deal equitably or justly with all, you shall marry only one", a condition which is practically impossible to comply with. Ill-treatment of wife is strictly prohibited and where she is habitually ill-treated, she has the right of obtaining a divorce. Wilson opines: "According to the special needs of his time and country, Prophet was a very earnest champion of woman's rights."

[1] See Abdul Rahim, Muhammadan Jurisprudence (1912), pp. 32-35.

In India, as already observed, the status of women suffered a socio-legal and cultural setback resulting gradually in loss of their freedom and decline in their education. This caused erosion in their personality and lowering their status. Evils like child marriage, polygamy, female infanticide, *sati* and exclusion of women from succession to property cropped up. Social inhibition and discriminatory practices continued during the British Raj. However, nineteenth century saw social reform movement and considerable awakening against social evils. With the intensification of freedom movement, the social scenario started changing. The national celebrities who were also the champion of women's equality motivated the women folk to get into the mainstream of national life. The period of British subjugation turned out to be an era of social reform. Multitudes of woman organizations sprang up to enhance women's cause through education and employment opportunity.

The framers of the Indian Constitution ushered in a new era for the Indian women who were accorded an equal status with men and a place of honour and dignity in the society. The Constitution envisaged the ideal of equality in its preamble which was elaborated in several provisions of its parts dealing with Fundamental Rights, Directive Principles of State Policy and Fundamental Duties. The fundamental law also prohibits discrimination on the ground of sex. It enables the states to make special provisions beneficial to women. The Constitution also casts on every citizen the fundamental duty to renounce practices derogatory to the dignity of women.[2]

[2] See Article 14, 15(1) (2), 16(2), 15(3) and 51 A(e) of the Constitution of India

Keeping with the letter and spirit of the Constitution, the legislations, that followed, comprised, *inter alia,* some codified personal laws of Hindu community. The sanctity and inviolability of the institution of marriage had degenerated into the instruments of women's enslavement and humiliation. Their status was sought to be restored in mid-fifties by introducing, through enactments, monogamy,[3] eligibility of daughter, widow and mother to inherit property along with son,[4] requirement of the consent of wife for adoption of a child by a married man, eligibility of a woman in child adoption, eligibility of a wife living separately to claim maintenance[5] and entitlement of a woman to appoint a guardian at will.[6] On the procedural side, the establishment of family courts facilitated speedy disposal of cases. And the appointment of women as judges has brightened the prospect of gender justice.[7]

The above and so many other considerations have motivated the researcher to do justice with the theme: *"Women Empowerment through Legislations in the area of personal laws: A socio-legal study of selected legislations in post-independent India",* by studying, analyzing, and suggesting the suitable yardsticks in this regard for ensuring the empowerment of women in the area of law and justice.

The modern trend in law is towards the realization of certain values, namely, the equality of sexes, social and economic security for women, and the development of secular outlook. The success or failure of

[3] See Hindu Marriage Act, 1955.
[4] See Hindu Succession Act, 1956
[5] See Hindu Adoptions and Maintenance Act, 1956
[6] See Hindu Minority and Guardianship Act, 1956.
[7] See Family Court Act, 1984.

marriage laws depends upon the extent to which they seek to realize these values.

Marriage and divorce are the most important institutions. On the one hand these are personal institutions. On the other the very basis of our society depends on these institutions and so their social aspects become extremely important. Marriage is now a basis of harmony and the foundation of co-operative endeavour.

That the primary cause of the family is purely biological is not true. To day, marriage under every religious system is not merely a response to the first instinct of men. Instead, it is a means to achieve some useful social goals like social harmony, well-being of weaker members of society i.e. women, children and aged ones, and healthy development of the human species. In view of the modern industrial age, it is necessary that there should be more consolidation and solidarity among the members of the family, and therefore, there is a need for state intervention now state is having welfare orientation.

As already stated, the present work is an attempt to analyze the various protective enactments concerning married women under the existing four major family laws (Hindu, Muslim, Christian and Parsi) with a view to examining how far these legislative measures ensure remedies in the marital life of the spouses. It reveals that prior to Independence, the *Shastric* laws of marriage, succession, etc. were heavily found biased against the wife. After Independence, however, most of the inequalities in respect of marital rights of Hindu wife have been sought to do away with through legislative measures. The basic objectives of these enactments were to confer equal rights and status on both the spouses and to ensure

justice to Hindu wife in their matrimonial home. However, these legislative measures though aimed at extending protection to women in their matrimonial home do ignore many major aspects and there are plenty of loopholes in the existing laws. The present study also reveals that these laws are not applied in the manner to accord rightful justice to the Hindu wives who are yet to secure legitimate rights and position in the matrimonial home. Very few have been benefited from this reformative and protective drive.

There is almost no principle introduced by the Hindu Personal Code which did not already exist somewhere in India as accepted law. On the other hand, there were several existing, much more liberal principles which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu law: but they persisted in calling their Codification 'Hindu'. At relevant places in the present study, the scope of improvement is pin-pointed by the researcher.

REVIEW OF LITERATURE

Several books, journals, articles, judicial decisions and juristic works which are available in different libraries on the topic, have been reviewed out of which numerous materials referred in the Bibliography have been studied and conclusion has been drawn in this regard. Apart from these materials available on different websites has also been taken into consideration while preparing the synopsis of the thesis.

RESEARCH HYPOTHESIS

The proposed research project plans to tackle the following questions hypothetically. Thus in the area of personal laws the Hindu law was given a sweeping face-lift in mid-fifties. The Parsi law has been amended in 1988 and has been brought almost at par with the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955.

The law of divorce of the Christians is still based on the English statute of 1857. I find a very outmoded law of divorce for the Christians. A few years ago an attempt was made to re-enact and consolidate the Christian family laws, but the move was strongly opposed by the orthodox bishops and was, therefore, dropped. Thus Christian divorce laws still remain extremely uncharitable to the Christian wives. Time and again pleas were made for its reform which had gone unheeded so far.

Considering from the above view points, the present attempt includes, in the main, the following selected enactments of post independent of India empowering women for critical analysis:

1. The Special Marriage Act, 1954.
2. The Marriage laws (Amendment) Act, 1976.
3. The Dowry Prohibition Act, 1961.
4. Maternity Benefit Act, 1961.
5. Equal Remuneration Act, 1976.
6. Family Courts Act, 1984.
7. The indecent Representation of women (Prohibition) Act, 1986.

8. The commission of Sati (Prevention) Act, 1987.
9. The National Commission for women Act, 1990.
10. The Muslim Women (Protection of Rights on Divorce) Act, 1986.
11. The Hindu Marriage Act, 1955.
12. The Hindu Adoption & Maintenance Act, 1956.
13. The Hindu Minority and Guardianship Act, 1956.
14. The Hindu Succession Act, 1956.
15. Indian Divorce Act, 1869.
16. Criminal Procedure Code, 1974
17. Christian Marriage Act, 1872

Obviously the study extends over varieties of laws and enactments, among religious and secular, substantive and procedural codified and uncodified- directly and indirectly connected with the women empowerment. In fact, these apart, there are a few more laws and enactments dealing with personal laws nevertheless only laws with wider scope of application have been considered and discuss critically. Those with limited scope have not been included for the purpose of this thesis.

RESEARCH METHODOLOGY

To accomplish the task, the researcher has utilized the following libraries:

Library of Indian Law Institute, New Delhi; Supreme Court Library, New Delhi; Sapru Library of New Delhi; Library of Faculty of Law,

B.H.U., Varanasi; The Library of Law Seminar, Faculty of Law A.M.U., Aligarh; The Library of Dr. Ambedkar Chair of Legal studies and Research, Department of Law, A.M.U., Aligarh; Maulana Azad Library, A.M.U., Aligarh; Library of Department of Sociology, A.M.U., Aligarh; Library of Department of Advance Study and Research of the Department of History, A.M.U., Aligarh; Library of the Department of Political Science, A.M.U., Aligarh, Library of Nadwadul Uloom, Lucknow, Library of Devband, Saharanpur, Library of Parliamentary Studies, New Delhi have been duly utilized for the purpose of this thesis.

Research methodology is treated to be effective tool to achieve the result. In process of the present study and research, the 'Doctrinal Research Methodology' is adopted focusing on materials available in different libraries. It is a library based research relying on leading libraries of our country dealing with books, treatises, journals, Acts, legislations, enactments, commentaries, approaches of social reformers, social activists and social scientists.

RESEARCH PLAN

Introduction apart, the total attempt in the shape of the present work has been divided into four parts namely: Part-I Women Empowerment in Personal Laws: Conceptual Analysis. An attempt on conceptual analysis of women empowerment has been made in Chapter-1. Women and Personal Law Systems in India are discussed in Chapter-2. Empowerments of women under personal laws in India are explained at length in Chapter-3. Empowerments of Women through different religious systems are discussed in Part-II under the

following chapters: Chapter-1 Marriage, Chapter-2 Dissolution of Marriage, Chapter-3 Succession, and in Chapter-4 Maintenance. In Part-III Empowerment of Women through legislations in post-independent India: Evaluation of relevant legislations are explained under Chapter-1 Hindu Women, Chapter-2 Muslim women, Chapter-3 Christian Women and in Chapter-4 Parsi Women. Selected Acts empowering women in post-independent India are critically analyzed in Part-IV like the Special Marriage Act, 1954, the Marriage laws (Amendment) Act, 1976, the Dowry Prohibition Act, 1961, Maternity Benefit Act, 1961, Equal Remuneration Act, 1976, Family Courts Act, 1984, the Indecent representation of women (Prohibition) Act, 1986, the Commission of Sati (Prevention) Act, 1987, The National Commission for Women Act, 1990 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Under the caption of 'Concluding Remarks and Suggestions', the academic exercise and research venture have been done pin-pointing the outcome of the study alongwith possible solutions which the researcher finds appropriate within the framework of this study.

In India the post-independence era has gradually but definitely produced a new jurisprudence, the evolution of which may be hailed as an evolution in our society and politics. But the result it is viewed has not been quite appreciable. In the last decade attention was paid to improve upon the status of women and it was felt that there was more need to arouse the consciousness of society towards the recognition of her identity and freedom. The unsatisfactory condition of women particularly in a developing country like India has inspired the humble soul to carry on this work. When one is reaching at the door of 21st

century, boasting alone will not suffice and one has to make positive and constructive efforts in right direction to achieve the said goal. An effort is being made through this work which, it is thought will be quite useful to governmental machinery, policy makers, social scientists and law reformers and champion of gender justice to find out ways and means to improve upon the status of Indian women.

The position of Hindu women during the *vedic* era was at par with men. In every social and religious ceremonies, she was associated with and actively involved. In the post-*vedic* era, the status of Hindu women gradually deteriorated and she was regarded as subservient to her counterpart i.e. male in all social and cultural activities. This condition could not improve even during the British rule. In the later part of the 19th century, national leaders and social reformers tried their best to improve upon the status of Hindu female. After independence, the Constitution of India envisaged socio-economic equality to all Indian citizens, irrespective of caste, creed or sex. No efforts have been spared in passing non-discriminatory legislations for the upliftment of socio-economic status of Hindu woman by the Indian Parliament.

The plight of Indian women did improve much even during the British period. A very few legislations could be passed at the instance of social reformers of British people during the British period but it did not ameliorate the condition of Hindu and Muslim females in particular and the Indian women in general. The legislative measures could only provide transitional relief and hope for survival but the environment and the public mood and opinion could not stand against social bias emergence from religious bias to show the willed psychology of males to free women from systematic subjugation. India

became free in 1947 and the Constitution of India came into operation in 1950. A new society and social order thus took birth. It was a society based on democratic norms. The new culture showed its sign. Prof. Deicey's conviction that from Coolie to the Prime Minister should be treated by the same law of the land and like should be treated alike became true theoretically after the enforcement of the Constitution of India. This Renaissance period is responsible to encourage women in general to fight for their identity and seek participation in public life. She now wants to be an active member of the changing pattern of the world. In every part they not only fight for the right of franchise, social and political activities, safety and security in hazardous private and public enterprises, but are devoted for ensuring their self-respect and dignity. The focus, it may be stressed is on the fact that a consciousness of right, liberty, freedom and engagement in public activities began to take its germs. Conditions of societies in every part of the world began to change in the 19th century. It saw the origin of a new concept of equality before law that no one should be discriminated on the ground of caste, creed, sex and religion. This noble principle of universal appeal gave a new lease of life to the words of Mahatma Gandhi, Lokmanya Tilak, Swami Dayanand and others that women should not be deprived of education and participation in the social and political life. The abolition of *sati Pratha,* punishment for arranging child marriages and the social approval and legal recognition for widow marriage and disintegration of Hindu Joint family howsoever slow it may be in the early Nineteenth Century opened the new vistas for her struggle in seeking a new identity of her own and finding a base for developing her personality. Equality before law in true democracy is a matter of right.

In 1950, the Constitution of India in its preamble provided ideals and aspirations of the people of India. The chief one of which was the equality of status and of opportunity, Article 14 of the Constitution partly incorporated the Dicey's principle- of equality before the law and partly the American concept of equal protection of laws. The equality clause expressly prohibits discrimination on the basis of race, religion, caste, sex and place of birth and guarantees of equality before the law and equal protection of laws irrespective of race, religion, caste, sex etc. Thus the Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women. This constitutional spirit found a distinct place and recognition in Hindu law legislations passed in the years 1955 and 1956 affecting matrimonial and property matters. In every sphere of domestic life the Hindu woman was treated at par with man whether it was the case of matrimony or marital rights or right to adopt and be adopted or to exercise the rights of guardianship over the minor children. It was conferment of a new status on her under the constitutional framework for the first time in the history of Free India. A new chapter was thus opened to improve her position and status in the family and accord a new personality and identity. The Hindu Succession Act, 1956 with the help of its sections 6, 8, 14 and 30 conferred a substantial and positive proprietary status on her and this showering of constitutional blessings could became a solid background for enriching her property rights. The legislative effort and judicial activism, if carried on persistently and uninterruptedly in its right earnest; with desired enthusiasm and zeal; with boldness and courage and with dynamism the day would not far off to grant her emancipation in general, the base has been laid down. It simply requires strong will,

a great determination and concerted will of each and every unit of the society to translate the aspirations of the Honourable members of the Parliament and make it a reality.

Article 14 of the Constitution ensures equality of status to all men and women. All men and women are equal before the law and are entitled without any discrimination having equal protection of laws. It recognizes women as a class. It removes disability attached to-women by passing the Hindu Succession Act, 1956. This Act has declared in an unequivocal term the property of the women belongs to her as her absolute property. Further, Section 8 of Hindu Succession Act has put female heirs at par with male heirs. Under Section 22 of the Hindu Adoption and Maintenance Act, 1956 allows illegitimate daughter to claim maintenance from those who take the estate in which she has a share and is not obtained by her. This preferential treatment is not violative of Article 14, as it puts daughter equal to son. In *C.B. Muthamma v. Union of India,*[8] the court upheld the principle of equality before law and held that denial of right to employment to married woman was discriminatory on the ground of sex. The Court upholding the principle of equality to status held that the female employees be treated at par with the male employees. The Orissa High Court *in Radha Charan v. State,*[9] held that the rule was discriminatory on the basis of sex if a married woman was disqualified from being selected at post of District Judge. The Supreme Court of India from time to time held the view that for being of fair sex if some disability was attached to woman it amounted to hostile discrimination against her being violative of Article 14 of the Constitution. Mr. Justice Fazal

[8] AIR 1979 SC 1868
[9] AIR 1969 Ori. 237

Ali in *Air India v. Nargesh Meerza* and others,[10] 5 held the rule violative of Article 14 if Air India Employees service Regulations provided that an Air Hostess was to resign from service: (a) upon attaining the age of 35 years, or (b) on marriage if it takes place within 4 years of service, or (c) upon first pregnancy whichever occurred earlier.

Article 23 of the Constitution prohibits traffic king in human beings and forced labour. Similarly, Article 24 prohibits employment of any child (which includes a female child) below the age of fourteen years to work in any factory or mine, or engage in any other hazardous employment. A brief analysis of these provisions would reveal how much our founding fathers were concerned in not only protecting the interests of women but also to ameliorate the conditions of this lot in totality. Forced labour in any form including *Beggar* and traffic in human beings is completely prohibited and any contravention of this provision has been declared an offence punishable in accordance with law.

The Directive Principles, under various Articles, provide special favour to women and direct the State to treat men and women equally. Article 38(2) directs the State to eliminate inequalities in status, facilities and opportunities. Article 39 provides that equally all men and women have the right to have an adequate means of livelihood and further, that there shall be equal pay for equal work for both men and women. To achieve this objective the State has passed, the Equal Remuneration Act, 1976. Article 42 provides that the labour must be provided just and humane conditions of work and maternity relief.

[10] AIR 1981 SC 1829

Article 43 provides that the State shall endeavour to secure a "living wage" and "decent standard of life" as a result of which the State has made suitable amendments in Factories Act, Mines Act, Plantation Act, etc. However, in 1987, the Parliament has amended the Equal Remuneration Act, 1976, having in view the pathetic condition of the unorganized sector, in order to ensure equal wages to all including women. The States have been directed by the Centre to enforce the provisions of the equal Remuneration Act strictly.

Women have acquired somewhat a respectable position through the Hindu law legislations now. An analysis of class I heirs reveals that out of 12 heirs, eight are female heirs and in schedule of class II heirs, ten out of twenty heirs are female. The most important change made by the Act is that daughter has been treated with son at par. Further, position of woman has been discussed in the light of Sections 15, 16 and 23 of the Hindu Succession Act. The discussion reveals that this Act has brought revolution in the process of Hindu law affecting society, culture and family behaviour and extolled the Hindu woman. The revolutionary changes brought about by the Hindu Adoption and Maintenance Act, 1956.

Marriage and divorce are the most important institutions. On the one hand these are personal institutions. On the other the very basis of our society depends on these institutions and so their social aspects become extremely important. Marriage is now a basis of harmony and the foundation of co-operative endeavour.

It reveals that prior to Independence, the *Shastric* laws of marriage, succession, guardianship etc. were heavily biased against the wife. After Independence, however, most of the inequalities in respect of

marital rights of Hindu wife have been sought to do away with through legislative measures. The basic objectives of these enactments were to confer equal rights and status on both the spouses and to ensure justice to Hindu wife in their matrimonial home. However, these legislative measures though aimed at extending protection to women in their matrimonial home ignore many major aspects and there are plenty of loopholes in the existing laws. The present study also reveals that these laws are not applied in the manner to accord rightful justice to the Hindu wives who are yet to secure legitimate rights and position in the matrimonial home. Very few have been benefited from this reformative and protective drive .Giving an account as to why the reformation drive by way of Hindu Code failed to deliver the desired good, M.Kishwar says:

> *"In the first decades of Indian independence, the codification and reform of Hindu personal law was hailed as a symbol of the new government's supposed commitment to the principles of gender equality and non-discrimination enshrined in the Constitution. This history of Hindu law reform, however, shows that when reformers claim to speak on behalf of huge segments of population, whose traditions and institutions they have no real knowledge of, they are more likely to do harm than good. Reform, to be meaningful, has to be based on creating a new social consensus".*

The author then continues:

> *"There is almost no principle introduced by the Hindu Personal Code which did not already exist somewhere in India as accepted law. On the other hand there were several existing, much more liberal principles which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu*

law, but they persisted in calling their Codification 'Hindu'.

Finally, the author sums up with the following note:

> *"Yet, the overall effect of the misleading rhetoric used of codifying law only for Hindus without giving them any option, and of trying to stamp out diversity in the name of Hindu unity was negative, insofar as:*
>
> *(1) It gave Hindus the false notion that Hindu women now have equal legal rights, which is far from being the case;*
>
> *(2) It created a myth that reformed Hindu law is 'secular', not 'religious' or 'personal' whereas Muslim Personal law i.e. 'religious', therefore backward and can be secularized only by Hinduising it;*
>
> *(3) It left Hindu with a ridiculous sense of grievance. They have begun to believe that Hindu men are worse off than Muslim men because the former have been deprived of 'rights' that the latter enjoy. [Thus it ends up] "Causing a deep rift between the Hindus and the Muslims".*[11]

As regards Christian law, it still remains in a chaotic state. It is unfortunate to note that the Christian Marriage and Divorce Bill made no headway as also the Indian Divorce Act is dreadfully antiquated. The Parsi family laws suffer from dichotomy. The Parsi of the presidency towns and those living outside are not governed by the same law. Their law is partly codified, and the procedure for application of divorce and related relief is not well designed. Very little is known about the family law of the Jewish community living in India A Jewish wife enjoys limited right to obtain a divorce by application to the Jewish panchayat. This segment of our family law regime has received no attention so far. It needs ardent attention. Even

[11] Madhu Kishwar, 'Codified Hindu Law: Myth and Reality; Economic and Political Weekly, Aug. 13, 1994. The paper was originally presented at a conference held at Oxford from May 30 to June, 1, 1990.

after the codification of Hindu law, the scheduled tribes particularly those who come within the definition of term 'Hindu', are exempted from its operation.

The changes in the world situations have had a great impact on the Islamic world and on Muslim community living outside the world of Islam. In India also there arose a movement of social change which gained momentum much before the declaration of Independence that ushered in an era of social legislation seeking to codify and modify the old marriage laws. The Muslim Personal Law (Shariat) Application Act, XXVI of 1937 is most important legislation in the closing years of British regime in India. The Act almost abolished the legal authority of customs among the Muslims of British India. The position of Muslim women, in few cases, was seriously undermined by then prevailing customs. Inheritance in particular had continued to be ruled by, often excluding women, among numerous communities of Muslims.

While bigamy has been made an offence for Hindus and the second marriage is void in law, such marriages are still prevalent. This law has become harmless to bigamist because of some procedural as well as substantive lacunae in it. In a considerable number of cases because of technical construction placed on Section 17 of the Hindu Marriage Act the existing penal provision against bigamy is defeated.

In the Hindu society polygamy was in vogue since time immemorial. The situation underwent a change with the passage of the Hindu Marriage Act, 1955 which made monogamy legally compulsory for all Hindus. Despite the law, certain devices have been engineered by the

irresponsible persons to make it possible for them to get a second wife in the presence of their first one. Some of these new devices are *maitri karars* and conversion.

India, a country of diverse religions and personal laws permits conversion from one religion to another. Among various personal laws operative in this country, bigamy is allowed only by Muslim Personal laws. Sometimes a non-Muslim in order to take a second wife in the presence of his first one resorts to 'sham conversion' to Islam,[12] thereby defeating the object of monogamous marriage law. The newly emerging trend of dishonest marriages through *malafide* conversion, if not checked in time, would cause the major source of trouble for women and society in near future. No doubt our Constitution guarantees to all citizens religious freedom including the option for conversion from one faith to another. But then it must be a *bonafide* and sincere conversion. This noble provision of our Constitution, under no circumstances, be allowed to be misused to trigger the unhappiness for women in their matrimonial home. Among the existing Indian personal laws Parsi marriage law and the Special Marriage Act, 1954 prohibit second marriage by conversion.

The restitution of conjugal rights came to be introduced in the Indian courts during the British regime.[13] Perhaps it was based on the notion of sound public policy and natural justice.[14] The relief emanates from

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[12] "Hema (Malimi) met Dharmendar, a married man with grown up children--- Even though Dharmendra did not divorce his wife Prakash, Hema agreed to being a second wife, despite this being illegal.In fact many Bollywood people converted to Islam just to marry again, another one being Mahesh Bhatt"- Nawalesh Pathak, "Why actress fall for married men". The Asian Age (Sunday number) 1 September , 1996.

[13] Paras Diwan, The Modern Hindu Law (1976), p. 164.

[14] R.K. Agrawala, Matrimonial Remedies under Hindu Law, (1974), p. 10, Mohammad Shabbir, Muslim Person law and judiciary (1988) p.

the concept of 'consortium'[15] and was extended to both spouses,[16] though in actual practice it is the husband who in most of the cases appears as plaintiff in his attempt to secure the society and company of his wife.[17] The paucity of the number of wives coming forward with such plea reflects the peculiar Indian social set-up wherein the wives' lack of courage to espouse their cause is manifest.[18]

In a restitution petition the real object is hardly achieved. It fails to bring about reconciliation between the contending parties who desperately find ways for separation. It serves no purpose other than providing psychological relief to the plaintiff who is determined to expose the other party in public. A perusal of the restitution cases under the Hindu law since 1954 has confirmed the fact that the restitution petitions were either to defeat the maintenance claim of the wife or to create conditions for divorce. It equally holds good, for cases under the Muslim law.[19]

The Indian Divorce Act, 1869 enacted by British Parliament for regulating matrimonial relations among Indian Christians is outmoded and archaic. The original British legislation, the harbinger of the Indian statute, has undergone qualitative changes to accord equality to both spouses in matrimonial matters. But the Indian law has failed to keep pace with the change as was done in cases of Hindu and Parsi law. There have been recommendations from many quarters for changes in this discriminating law. The Supreme Court and High Courts have called upon the Parliament and State Legislatures to introduce changes

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[15] A.A.A. Fyzee, Outlines of Muhammedan Law (edn. 4th) p. 121.
[16] K.P. Saksena, Muslim Law as Administered in India and Pakistan, (1954), p. 207.
[17] *Kateeram Dokanee v. Mst. Gendhenee*, (1875) 23 Soth WR 178.
[18] Supra note 62.
[19] *Ibid.*

in this law.[20] The Law Commission of India has recommended revamping of the Christian marriage and divorce legislation in its several reports. In its *Fifteenth Report on Law Relating to Marriage and Divorce amongst Christians in India (1960),* the Commission had made detailed recommendations for reform of Christian marriage and divorce laws As a result, the Law Ministry drafted a Bill and referred it back to the Commission for eliciting public opinion. On the public opinion being obtained, the Law Commission submitted its *Twenty-second Report on Christian Marriage and Matrimonial Causes Bill 1961,* recommending a thorough revision of the existing legislation. Accordingly, a Bill entitled 'The Christian Marriage and Matrimonial Causes Bill' was introduced in Parliament in 1962. The Bill however, lapsed with the *Lok Sabha* being dissolved. Years later, the Law Commission in 1983 headed by K. K. Mathew had taken up *suo motu* the issue of revision of Section 10 of the Indian Divorce Act in view of sex-based discrimination applicable to Christians.

In the Hindu society the custom of dowry has been prevailing since time immemorial. It has gradually become an evil. The social reformers have been trying their best to uproot it. Though dowry has no place in Islam, it has made inroads to the Muslim society of this subcontinent, as they too, form a part of the indigenous social texture. As back as 1940, Maulvi Aftab Ahmad of Bengal moved a Dowry Prevention Bill in the Bengal Legislative Assembly which, however, could not be enacted due to various reasons.[21] On independence, Indian Parliament passed the Dowry Prohibition Act in 1961, which was

[20] *SC Selvaraj v. Mary,* (1958) 1 MLJ 289, *Ms. Jonden Diengdeh v. SS Chopra,* AIR 1985 SC 935.
[21] Pradyumma Arora; 'Pakistan: The Dowry and Bridal Gifts (Restriction) Act, 1976'. Islamic and Comparative Law Quarterly (Vol. II:1) 1982, p. 73.

amended in 1984. It applies to all communities. In 1967 the Pakistan Dowry (Prohibition and Display) Act was passed. The situation assumed so much an alarming proportion that the Dowry and Bridal Gifts (Restriction) Act, 1976 had to be legislated, followed by the Dowry and Bridal Gifts (Restriction) Amendment Ordinance, 1980. Bangladesh, too enacted a legislation in a bid to thwart this evil in 1980.

An approved marriage among Hindus has always been considered a *kanyadan*. The *Dharmashastra* also rules that this meritorious act is not complete till *dakshina* was given to the bridegroom. Father after decking his daughter with costly garments and honouring her by presents of jewels gifted her to a bridegroom whom he also presented in cash or kind known as *vardakshina*. Certainly whatever presents or gifts were given to the daughter constituted her *stridhan* or separate property. The ground reality is that the *vardakshina*, under no circumstances, constituted property of the bridegroom. Based on love and affection, the gift was completely voluntary in its origin and character. Later it assumed the frightening name of dowry, an inhuman coercive transaction

The Dowry Prohibition Act, 1961 did not prove effective. The evil continued to reign supreme. Several Indian states like West Bengal, Bihar, Orissa, Haryana, Himachal Pradesh, Punjab amended the act of 1961 in a bid to curb the evil by enhancing punishment for dowry offence, but with little success.

Later a Joint Parliamentary Committee was appointed to look into the problem which attributed two reasons to the failure of the Act, namely,

the Act's exclusion of all presents, whether given in cash or kind, from the definition of the dowry unless given in consideration of the marriage, and lack of effective enforcement machinery. Accordingly the Joint Committee made some recommendations. Parliament accepted some of them. These were incorporated in the Dowry Prohibition (Amendment) Act, 1984.[22]

In course of time dowry has become a widespread social evil. It has now assumed an alarming proportion. The cases of brides being beaten up starved and tortured for not having brought sufficient dowry are the usual feeds of our national dailies. In order to update the procedural aspect of the law, the Law Commission of India recommends as follows:

> *"(1) A provision as under should be inserted in the Indian Evidence Act, 1872:*
> *"where—*
>
> *(a) married woman dies, within five years of her marriage, of burns or injuries sustained by her in the house in which she and her husband were residing together immediately before the death, or from other cause of a similar nature, and the death takes place behind close door?, it may be presumed that the death was not accidental."*[23]

Surprisingly the evils of dowry have spread to the other communities which traditionally were not involved in this custom. The practice of giving and taking dowry is operating in the Muslim community in the guise and pretext of *jahez (dahez), salami,* and *neundra* of which our Indian legislation has no mention.

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[22] Paras Diwan: Notes & Comments, Dowry Prohibition Law, JILI (vol. 27: 4) 1985.
[23] Law Commission of India, Ninety-First Report (1983)

The position of Christian women appears to be nearly satisfactory due to higher percentage of literacy, progressive views and open mind attitude. They are enjoying more liberty in action; freedom in choice of job and protection through law. The minority protection clause in the Constitution also helps her in securing freedom and equal treatment like any other women. But many changes are required in the laws applicable to them for actual amelioration.

Parsi women suffer from two major setbacks namely.

1. That their stringent law does not permit inter caste marriages.
2. Discriminatory treatment is meted out to them in matter of holding and succeeding the property.

It is hoped that the existing Parsi Law will be changed in course of time to bring it in tune with Indian democratic norms.

It appears that the empowerment of women in the area of personal laws through legislations differs personal law to personal law. Hindu Personal law after the commencement of the Constitution of India has witnessed improvement ensuring gender justice and over all empowerment. In Christian matrimonial laws the pace of empowerment is quite poor and there is need to improve the situation taking into account the egalitarian philosophy of the constitution of India, however, in the area of property matter there is no objectionable provision. Parsi personal law has improved itself ensuring empowerment of women. Under Muslim Personal Law to empower women still a lot to be done yet in India.

Indian Muslim women have not been able to come up to catch the fast march of progress as compared to women belonging to other

communities especially Hindus, Christians and Parsis because they are lacking enlightened leadership and also due to extra care of religious and cultural identity which is based on orthodoxy. They are in need of empowerment especially in area of their personal laws affecting their matrimonial and property matters. In post-independent India legislative outcome in this area is quite minimal. They are also not much organized as they are not having dominant and influential organizations for pushing the matter of empowerment as other communities women organizations are doing very effectively. Researcher points it out this aspect whenever relevance is sensed in process of expanding the thesis. Also, researcher is of the view that to satisfy the essence of empowerment reforms in Muslim Personal Laws are immensely needed taking into account fast changing pattern of society sharing the trends of the Muslim world respecting the primary sources of Islamic Jurisprudence. Muslim Personal Law Board is only organized institution and it comprises enlightened Muslim leadership alongwith experts in different area of knowledge who can contribute meaningfully and constructively for the empowerment of Muslim Women in the area of Muslim Personal Law. This Board has been urged to come forward taking up the agenda of empowerment of Muslim women in the area of personal laws.

An encouraging development in all these years is the growth of organized articulation of women's problem by women organizations. There has been a rapid growth in Women's organizations to protest against crimes of violence against women, against the institution of dowry, against discrimination in employment and economic status and the like. While many new women's organizations sprang up, older, more established organizations also become more active. All these

organizations have displayed new capacity to take up women's problems, concerns and issues at different fora-media, political parties, law, academia, the bureaucracy and other professions cutting cross the sex and caste considerations.

WOMEN EMPOWERMENT THROUGH LEGISLATIONS IN THE AREA OF PERSONAL LAWS: A SOCIO-LEGAL STUDY OF SELECTED LEGISLATIONS IN POST INDEPENDENT INDIA

THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

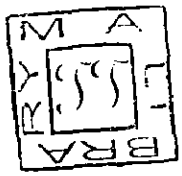
Doctor of Philosophy

In

Law

By

RAKHSHANDA MUBEEN



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This is to certify that Ms. Rakhshanda Mubeen has completed her Ph.D. thesis captioned "Women Empowerment through Legislations in the Area of Personal Laws: A Socio-Legal Study of Selected Legislations in Post-independent India" for the award of the Degree of Doctor of Philosophy in Law under my supervision.

This is an original work and meaningful contribution to the existing legal knowledge. Relevant used materials are duly acknowledged. This is fit for submission for the award of the Degree of Doctor of Philosophy in Law.

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Acknowledgement

The Almighty Allah always blessed me with all the strength which I required at moments when I felt slightly derailed from the track. It is He who has disposed the proposed.

At the outset, I deem it a great privilege to place on record my deep sense of gratitude to my Supervisor **Prof. Dr. Mohammad Shabbir** *(Ambedkar Chair Professor of Law), Chairman, Department of Law, AMU, Aligarh and Incharge/Director, Dr. Ambedkar Chair of Legal Studies and Research, Department of Law, AMU, Aligarh. Without his constant support both academic and moral it would not have been possible for me to complete this research work. I do acknowledge his rich academic contribution and cooperation of this work.*

I feel pleasure in expressing my deep sense of gratitude and thanks to **Prof. Dr. Saleem Akhtar,** *Dean, Faculty of Law AMU, Aligarh for his sympathetic and inspiring attitude.*

Sincere gratitude is also expressed to all my teachers and colleagues especially Prof. Akhlaq Ahmad, Prof. Iqbal Ali Khan, Dr. Javed Talib, Dr. Zaheeruddin, Dr. Zubair A.Khan, Dr. Shakeel Ahmad Samdani and Dr. Badar Ahmad whose sincere encouragement was a tremendous moral support to me.

I am also grateful to Dr. Zafar A. Khan for his constant support, unforgettable help and encouragement.

I feel my sincere duty to express my heartfelt thanks to **Dr. (Mrs.) Khan Noor Ephroz,** *Principal, Vivekananda College of Law, Aligarh for her inspiration, cooperation and academic contributions.*

Parents are the symbol of love, affection and everlasting bless. I have been lucky enough to enjoy the everlasting encouragement, love, affection, guidance and blessing of my parents. Words are insufficient to express my gratitude to my father Late Mr. Mubeen Hasan Khan and my sister Mrs. Fatima Mubeen for being a constant source of motivation.

My special thanks to my Husband Mr. Mohd Sajid for his moral support and help at various stages of the work. My daughters Hira Sajid, Sidra Sajid and Son Mohd Mamoor are the symbol of success for me during this research work.

I am specially beholden to my mother-in-law Mrs. Khalida Begum for her encouragement in every possible way in accomplishing this task successfully.

My brothers-in-Law Dr. Abdul Matin and Sister-in-Law Mrs. Safia Matin deserve special mention that always inspired me during this research work.

I express my sincere thanks to the office members of the Department of Law and Law Seminar Library who rendered great assistance to me in collection of materials.

I feel heavily indebted to express my most sincere thanks to Mr. Zaheer Ahmad, Stenographer-cum-Computer Operator, Dr. Ambedkar Chair of Legal Studies & Research, Department of Law, AMU, Aligarh and all those who helped me in one way or the other in completing of this academic endeavour.

Rakhshanda

Dated:..... *(Rakhshanda Mubeen)*

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PART-II

Empowerment of women through different Religious system

Introduction

INTRODUCTION

Women have a unique position in every society whether developed, developing or underdeveloped. This is particularly due to the various roles they play during various stages of their life, as a daughter, wife, mother, sister etc., inspite of her contribution in the life of every individual human being, she still belongs to a class or group of society which is in a disadvantaged position on account of several social barriers and impediments. She has been the victim of tyranny at the hands of men who dominate the society. The position of Indian woman is no better compared to their counterparts in other parts of the world. On one hand, she is held in high esteem by one and all, worshipped, considered as the embodiment of tolerance and virtue. But on the other hand, she has been the victim of untold miseries, hardships and atrocities caused and perpetuated by the male dominated society. The vulnerability of the women as a class has nothing to do with their economic independence. The women have been victim irrespective of their economic background. The rich and the poor alike are the victims of social barriers and disadvantages of varying kinds. A Report of the United Nations Organizations points out that women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth percent of world's property.

In India almost half of the Indian populations are women. They have always been discriminated against and have suffered and are suffering discrimination Even though self-sacrifice and self-denial are their nobility and virtue, yet they have been made the victims of all

inequalities, indignities, inequities and discriminations, from time immemorial. These are some of the factors that prompted the legislature to make various laws to give the women their due share. The Constitution of India prohibits discrimination on the ground of sex. This prohibition of gender-based discrimination has been given the status of a fundamental right. Various other laws have been enacted to deal with the personal matters like marriage, divorce, succession etc. with regard to the women. The criminal law also contains numerous provisions to deal with the crimes committed against women; enactments like the Dowry Prohibition Act supplement the existing criminal laws to combat the evil of dowry. Number of labour and industrial laws provide for the protection and welfare of the women, which include maternity benefit, prohibition of employment of women in dangerous activities and creche facility for the children of working women. In order to curb the immoral and anti-social practice of prostitution, the Immoral Traffic (Prevention) Act has been enacted. The female foeticide and infanticide have assumed dangerous proportions and the determination of sex of the foetus which became possible due to the advanced scientific inventions, abetted the commission of these inhuman acts. The Parliament has passed the Pre-natal Diagnostic Techniques (Regulation & Prevention of misuse) Act, 1994 to arrest this undesirable trend. These legislative measures aforementioned are only illustrative in nature and not at all exhaustive.

The Parliament of India has realized the importance of a monitoring institution to examine and investigate all the matters relating to the safe guards provided for woman under the Constitution and other Laws.

This realization has led to the enactment of the National Commission for Women Act, 1990 which came into force with effect from 31st January, 1992. Though this Commission consists of a Chairperson and five members nominated by the Central Government, has been entrusted with the task of presenting to the Central Government the problems of women, deprivation of women's rights, and the reports of the progress of the development of woman under the Union and any State though it has not been given Constitutional Status. However, this body has been burdened with the laborious responsibility of reporting to the government as to the efficacy and effective implementation of the safeguards for improving the conditions of woman by the Government, and for monitoring the socio-economic development of woman in all walks of their life. Unfortunately, the Commission can make only recommendations and send the same to the respective authority for action. It has no Judicial Powers for making it an effective instrument for providing relief to woman in distress. Mr. Justice V. R. Krishna Iyer aptly remarked that a National Commission for Women has "hardly any teeth or nail". It is good development that now the Commission has been given the Judicial Powers and also conferred the Constitutional status. Indian women are becoming more and more conscious of their constitutional and statutory rights. This consciousness has awakened in them a sense of urgency in experiencing equality and social justice. Without equality and social justice there cannot be democracy in the real sense.

Civilized human beings consider the notion of equality and liberty as the basis of modern society. The society, wherein if one of the notions is not accepted, is known as an unjust or unrighteous one. These ideas

have more relevance today, because they are treated as the foundation of today's society on which the entire structure of democracy is based. And for that reason no one will oppose "freedom" and "equality" openly unless one is authoritarian. The notion of equality has various dimensions and perceptions. The true meaning of equality, in short, is uniformity of legal rights for all.

"Equality, therefore, means first of all the absence of special privilege. Equality means, in the second place, that adequate opportunities are laid open to all." There is an aspect in which the things without which life is meaningless must be accessible to all without distinction in degree or kind "The eloquent analysis of the self-actualization, realization of freedom, availability of opportunity and satisfaction of primary needs to each and every individual man and woman in the society."

The Universal Declaration of Human Rights adopted by United Nations General Assembly in 1948 claims that "All human beings are born free and equal in dignity and rights." For egalitarianism, men and women are equal before the law and there must be 'equality of opportunity'.

Equality provides social justice. It makes a full human being. The holistic development of man and woman is impossible without social justice. It protects the weak and limits the powers of the strong and acts for the welfare of every one. Justice involves the notion of impartiality. People must be treated in the same manner unless there are good or special grounds for treating them differently. Now justice is recognized universally as some sort of equality.

Justice to men and women is the abiding creed in the Constitution of India. It is our faith in the dignity of woman governed by moral, natural and written laws. Social justice to woman defines our full view of life. It establishes beyond doubt a woman's inalienable rights, which belong to not only educated women but also the illiterate ones. Social justice provides strength to a woman, because she is no more a prisoner of customs and history.

The discrimination being a female is obvious in the Indian Society, such as the lower life expectancy, minimum education, poorly paid jobs, lower status expectations and very few rewards than men in comparable situations. The process of selection and elimination operating through a complex system of institutional network results in the narrowing down of options for women. Sex role differentiation and ideological assumptions about "Women's place" is linked to the unequal distribution of resources, rewards, rights and authority between men and women which in turn influence patterns of family and work life.

One of the major goals of the emergence and stabilization of certain values in the society is the development of women, which can help women to achieve a richer and happier life. To bring about such value change and subsequent development, conscientization is necessary. Problem-posing education can appeal a woman to re-create her life. It provides her a new insight that she is a distinct individual with rights and duties and is able to "make" and change her world. She can put herself into a distance from her environment, think ahead by creating mental images of the future as it should be for her and act on nature and re-build her life and surroundings. Conscientization helps a

woman to bring about new values and changes by action and reflection which lead toward her development.

The Hindu law-givers did not permit women to inherit property. So a revolutionary change took place with the passage of Married women's Property Act of 1874 which widened the scope of *Streedhana* and the money she acquired through her artistic and literary skills. Side by side the *Streedhan*-movable property which was given to the woman by her parents or husbands also remained intact. The women's lot needed amelioration was the prevailing view and the reformers wanted women to return to the Vedic glory and other placed definite plans to eradicate their problems. Some reformers, like Dayanand Saraswati, gave a severe shock to the traditional society when launched the Suddhi movement and attempted to take back women in the Hindu fold who were converted to Islam or Christianity. Other reformers argued in favour of holistic development programme. Yet others fought for official intervention and social legislations. All reformers had to face opposition from the reactionaries in Hindu society.

Since Independence, All India Women's Conference became interested in constructive work and left its agitational attitude of pre-independence era. Its activities since Independence led to the enactment of social legislations with reference to women. Some significant ones are: Women's Legal Rights, 1952; the Suppression of Immoral Traffic in Women and Children Act, 1954; The Special Marriage Act, 1954; the Hindu Marriage Act, 1955; the Hindu Marriage and Divorce Act, 1956; the Hindu Adoption and Maintenance Act, 1956; the Hindu Minority and Guardianship Act, 1956 ; Interstate Succession Act, 1956; the Orphanages and Widow

Home Act; The Orphanages and other charitable homes (supervision and control) Act, I960 and the Dowry Prohibition Act, 1961.

The requirement of our age make it necessary to examine and weigh once more many matters about which it is no longer enough to accept the old assessment. The system of family rights and Responsibilities are one of these matters. In the years subsequent to the seventeenth century, there was a movement in the area of social affairs, which took place in the wake of scientific and philosophical development, and which went under the name of Human Right. In this age, it has been commonly supposed that the basic questions in this area are the liberation of women and the equality of their right with men. All other problems are off-shoot of these two matters. By the time the human civilization comes to arrive at this state of consciousness about its women folk, the latter has to pass through varieties of ordeal and humiliation in the hand of her male counterpart.

The position of women reflects the cultural attainment of a society. A major index of modernization of any society is the position of its women *vis-à-vis* men. The more balanced the opportunity structure for men and women, the higher the status enjoyed by women in the society. However, the status of women suffered a setback both on the religious and Philosophic as also on the socio-legal plane.

Originally a female under the Roman law had very little of personal and proprietary independence, but gradually she extricated herself out of it. According to Sir Henry Maine, there were three modes in which marriage might be contracted under Roman usage: '*conferreatio*' involving a religious solemnity and, '*coemptio*' and '*usus*', involving

observance of certain secular formalities. On marriage, the husband acquired a number of rights over the person and property of his wife which was on the whole in excess of such as are conferred on him in any system of modern jurisprudence. However, at the most splendid period of Roman greatness, these three forms of marriage fell into disuse and were founded on the modification of the lower form of civil marriage.

Hindu law and customs were extremely unfavorable to woman. She was treated as inferior to man. The great law- giver Manu says that "Day and night must women be held by their protectors in a status of subjection". It is true that after some time life interest in the property was given to them under the name of stridhan, but because the custom of *suttee* came into practice that right was of no practical value. A window burnt herself alive with the dead body of her husband and that horrible custom was the most gloomy picture of the position that women held in the social economy of the Hindu life. Women were some times made the wife of several brothers at the time. She was sometimes put on the gambling stake and lost. Even up to the other day there was no limit to polygamous marriage in Hindu society. A Hindu widow could not adopt a son unless her deceased husband had left her permission to do so. She could not get any alienable right in property. She could be married without her consent when only a child of four or five years of age. Marriage was viewed as a gift of the bride by her father or other guardian to the bride-groom. As a daughter she was only entitled to expenses of her marriage from her father's estate. She had no right to succession along with her brother. No girl was allowed to be adopted by Hindus. Remarriage was not allowed. Once married,

she could not get divorce. Her status in the society was negligible. A father was never expected to eat at her husband's house, and so on.

From an ethical point of view there is hardly any religion which stands on such a high idealistic plane as Buddhism does. Yet it has not much to say in favour of woman.

The whole fabric of Christianity rests upon the criminality of woman. If Eve had not shown the frailty of going astray, if she had not tempted innocent, child like Adam, sin would not have become inherent inhuman nature, and no saviour would have been required no spilling of human blood would have been needed to "cleanse". Jesus said that he had come to fulfill the law, so he accepted "Thy desire shall be to thy husband and he shall rule over thee" as the maxim of a married life for women. Under English law, wife had no independent identity. The notion of the unity of the personalities of husband and wife prevailed. She had no separate legal existence. She was incapable of holding separate property. So neither the husband could make any grant in her favour, nor could she bring any action for redress against anybody without his consent. The disabilities were subsequently modified by the Court of Equity and The Married Women's Property Act.

Pagan Arabs, the women in Pre-Islamic Arabian Penninsula were treated as chattels. They enjoyed no legal rights. In youth, they were the property of their fathers and after marriage the husband became their lord and master. A woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin or any other male guardian to give her in marriage, whether she was old or young,

widow or virgin to whomsoever he chose. Her consent in marriage was not required.

Polygamy was prevalent, and there was no restriction as to the number of wives one could have. Along with the formal marriage, group marriage, flag marriage prostitution, marriage by barter and temporary marriage ('*muta*') were in vogue. In regular marriage, dower formed a part of the marriage contract. In some cases the guardians of the girls used to take the dower for themselves. Imputation of unchastity used to deprive a woman of her dower. Husband's power as regards divorce was unrestricted. He could divorce his wife as many times as he liked and could contract fresh alliance of marriage with her every time. Even on pronouncement of divorce, it depended on his discretion whether the marriage was dissolved or not.[1]

The position of widows was also miserable. It often happened on the death of a man leaving widows that his son or heir would immediately cast a shroud of cloth on each of the widows (except natural mother) purporting to annex them to himself. In case the widow escaped, her dower was denied. This caused difficulty for her sustenance, as she had no right to inheritance. In short, woman was treated unfavourable all over the world before the advent of Islam. Almost all the social laws were against her.

Ameer Ali beautifully depicts the reforms introduced by the Islam which brought about complete change in the position of women. The improvement was so vast and striking that their position became unique as regards their legal status and far superior to any other legal

[1] Abdul Rahim, Muhammadan Jurisprudence (1912), pp. 32-35.

system of the world? The *Qur'an*, the paramount source of Islam as a first step categorically warned against burying the female children alive and promised great reward for their proper upbringing. It reformed the marriage system. It strictly abrogated the last three forms of marriage. Prostitution was abolished. Temporary marriage (*muta*) was forbidden after the tenth year of *Hijra*. Polygamy was restrained by a *Qura'nic* injunction limiting the number of wives up to four at a time with a note of caution, "If you (husband) cannot deal equitably or justly with all, you shall marry only one", a condition which is practically impossible to comply with. Ill-treatment of wife is strictly prohibited and where she is habitually ill-treated, she has the right of obtaining a divorce. Wilson opines: "According to the special needs of his time and country, Prophet was a very earnest champion of woman's rights."

As long as a woman is minor, she remains under the control and care of her parents. But on attainment of puberty, the law vests in her all the rights and privileges, as an independent human being. She is entitled to share of inheritance of her parents along with her brother. Though the distinction is founded on a just comprehension of relative circumstances and position of the two, on her marriage her individuality is not lost, and she remains a distinct member of the society. Her existence or personality is not merged into that of her husband. The contract of marriage gives no power over her person beyond what the law defines and none whatever upon her goods and property. Her property remains hers in her absolute individual right. The doctrine of covertures is not recognized in Islam. She can sue and be sued. After she has passed from her father's house into her

husband's home, she continues to exercise all the rights and privileges which the law allows. She can alienate or transfer her property in any way she pleases without any extraneous control of her husband. Her earnings acquired by her personal exertions cannot be touched by her husband. She enjoys this unique position and legal status by authority of the Book of God i.e. *Qur'an.*

To reach her present stage the Western woman had to swim through troubled waters and there were national revolutions and reforms to change her fate-lines. Plato did concede them the equal status in his "Republic". But it is almost a lone example. He was among the philosophers who came first to accord women an equal place with men in sharp contrast to Aristotle and Rousseau who held completely different attitude to women as ardent champion of equality, Rousseau was uncharitable, when it came to women. Aristotle based his theories of slavery and subservience of women on alleged natural difference. Among English think-tanks John Stuart Mill was the real advocate of women's right and their cause. His ideas stand out in contrast to his predecessors and contemporaries. One among such was Jeremy Bentham, the eminent utilitarian who would not accord women the equality. In the domain of socialist thought the institution of private property was denounced as it was, according to them, the root cause of relegating women to a secondary position.

The perennial subjugation of women accounts for the growth of feminist movement in the West which had its sway in 1940's and 1970's. As a result the policies and politics of Britain and the United States were adequately affected. Both in Britain and in America the controversy centres round the question as to whether women were

"persons" or "citizens". This question has intrigued the judiciary in the West for long and the decisions given till recently were greatly male chauvinistic or protectionist. Women for quite some time were not included in the term "person". Only in 1929 in Britain the controversy ended in women's favour. And from America, as late as 1971, cases of such nature have kept coming in.

The position of the modern women so enviable is a creature of industrial revolution, forced economic conditions, and shortage of man-power during wars which compelled her to stand up and fight against the challenge of time. After pointing out that, although the liberty of women was talked about during the French Revolution, without there being any practical change in their position, Will Durant remarks, "Until 1900 or so a woman had hardly any rights which a man was legally bound to respect". Writing about the causes for a change in the status of women in the twentieth century he said: "The emancipation of women was an incident of the Industrial Revolution. They (women) were cheaper labour than men. The employer preferred them as employees to the more costly and rebellious males. A century ago, in England, men found it hard to get work, but placards invited them to send their wives and children to the factory gate". Mary R. Beard, an American writer has summed up three divergent viewpoints, namely, democratic, communist and fascist, on the subject of women's place in society. According to her, democratic, communist and fascist view points about the rights of women and their place in the society were in part moulded by certain historical conditions and in part by political or military expediency designed to secure a larger following by enlisting support of women. The history of women's emancipation

in France, England, America, Germany, Spain, Italy and Russia all lend support to the above view.

In this connection Murtada Mutahhari observes that the steps that Islam took with respect to the rights of women are, without doubt, basically different in two ways from what is going on in the West. First, in the area of the psychologies of man and woman, Islam has accomplished a miracle, and secondly, that despite the fact that Islam acquainted woman with her human rights, gave her individuality, freedom and independence, it never induced her to revolt and mutiny against, or be cynical towards the male sex. The Islamic women's movement was a 'white' movement a pure movement based on the fundamental nature of woman, and not allied to some particular man-made ideology. Daughter's respect for their fathers and wives' respect for their husbands were not done away with. The foundations of family life were not wrecked. It did not make women despite having husbands, being mothers and bringing up children. The Islamic teachings on this subject, therefore, spring from the ultimate facts of human nature in its local content. Military necessity, political expediency or merely blind revolt against the past did not in any way affect Islam's solution of the sex problem.

In India, as already observed, the status of women suffered a socio-legal and cultural setback resulting gradually in loss of their freedom and decline in their education. This caused erosion in their personality and lowering their status. Evils like child marriage, polygamy, female infanticide, *sati* and exclusion of women from succession to property cropped up. Social inhibition and discriminatory practices continued during the British Raj. However, nineteenth century saw social

reform movement and considerable awakening against social evils. With the intensification of freedom movement, the social scenario started changing. The national celebrities who were also the champion of women's equality motivated the women folk to get into the mainstream of national life. The period of British subjugation turned out to be an era of social reform. Multitudes of woman organizations sprang up to enhance women's cause through education and employment opportunity.

The framers of the Indian Constitution ushered in a new era for the Indian women who were accorded an equal status with men and a place of honour and dignity in the society. The Constitution envisaged the ideal of equality in its preamble which was elaborated in several provisions of its parts dealing with Fundamental Rights, Directive Principles of State Policy and Fundamental Duties. The fundamental law also prohibits discrimination on the ground of sex. It enables the states to make special provisions beneficial to women. The Constitution also casts on every citizen the fundamental duty to renounce practices derogatory to the dignity of women.[2]

Keeping with the letter and spirit of the Constitution, the legislations, that followed, comprised, *inter alia,* some codified personal laws of Hindu community. The sanctity and inviolability of the institution of marriage had degenerated into the instruments of women's enslavement and humiliation. Their status was sought to be restored in mid-fifties by introducing, through enactments, monogamy,[3] eligibility of daughter, widow and mother to inherit property along

[2] See Article 14, 15(1) (2), 16(2), 15(3) and 51 A(e) of the Constitution of India
[3] See Hindu Marriage Act, 1955.

with son,[4] requirement of the consent of wife for adoption of a child by a married man, eligibility of a woman in child adoption, eligibility of a wife living separately to claim maintenance[5] and entitlement of a woman to appoint a guardian at will.[6] On the procedural side, the establishment of family courts facilitated speedy disposal of cases. And the appointment of women as judges has brightened the prospect of gender justice.[7]

The above and so many other considerations have motivated the researcher to do justice with the theme: *"Women Empowerment through Legislations in the area of personal laws: A socio-legal study of selected legislations in post-independent India"*, by studying, analyzing, and suggesting the suitable yardsticks in this regard for ensuring the empowerment of women in the area of law and justice.

The modern trend in law is towards the realization of certain values, namely, the equality of sexes, social and economic security for women, and the development of secular outlook. The success or failure of marriage laws depends upon the extent to which they seek to realize these values.

Marriage and divorce are the most important institutions. On the one hand these are personal institutions. On the other the very basis of our society depends on these institutions and so their social aspects become extremely important. Marriage is now a basis of harmony and the foundation of co-operative endeavour.

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[4] See Hindu Succession Act, 1956
[5] See Hindu Adoptions and Maintenance Act, 1956
[6] See Hindu Minority and Guardianship Act, 1956.
[7] See Family Court Act, 1984.

That the primary cause of the family is purely biological is not true. To day, marriage under every religious system is not merely a response to the first instinct of men. Instead, it is a means to achieve some useful social goals like social harmony, well-being of weaker members of society i.e. women, children and aged ones, and healthy development of the human species. In view of the modern industrial age, it is necessary that there should be more consolidation and solidarity among the members of the family, and therefore, there is a need for state intervention now state is having welfare orientation.

The Universal Declaration of Human Rights says that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the state. According to Lord Westbury, among all the laws of the state, the laws of marriage and divorce are the most important.

There is no denying the fact that the women, as one of the partners to marriage contract, have been discriminated against since the dawn of the human civilization. Though the principle of equality of the sexes has found its way into the basic laws of a good many countries, the gap between the *de jure* and *de facto* situations of women still remain wide. Therefore, most of the countries of the world have introduced drastic changes in the institution of marriage and divorce.

As already stated, the present work is an attempt to analyze the various protective enactments concerning married women under the existing four major family laws (Hindu, Muslim, Christian and Parsi) with a view to examining how far these legislative measures ensure remedies in the marital life of the spouses. It reveals that prior to Independence, the

Shastric laws of marriage, succession, etc. were heavily found biased against the wife. After Independence, however, most of the inequalities in respect of marital rights of Hindu wife have been sought to do away with through legislative measures. The basic objectives of these enactments were to confer equal rights and status on both the spouses and to ensure justice to Hindu wife in their matrimonial home. However, these legislative measures though aimed at extending protection to women in their matrimonial home do ignore many major aspects and there are plenty of loopholes in the existing laws. The present study also reveals that these laws are not applied in the manner to accord rightful justice to the Hindu wives who are yet to secure legitimate rights and position in the matrimonial home. Very few have been benefited from this reformative and protective drive .Giving an account as to why the reformation drive by way of Hindu Code failed to deliver the desired good, M. Kishwar says:

> *"In the first decades of Indian independence, the codification and reform of Hindu personal law was hailed as a symbol of the new government's supposed commitment to the principles of gender equality and non-discrimination enshrined in the Constitution. This history of Hindu law reform, however, shows that when reformers claim to speak on behalf of huge segments of population, whose traditions and institutions they have no real knowledge of, they are more likely to do harm than good. Reform, to be meaning-fid, has to be based on creating a new social consensus, a task seldom taken seriously by those who are enamored with statist measures imposed from above".*

There is almost no principle introduced by the Hindu Personal Code which did not already exist somewhere in India as accepted law. On the other hand, there were several existing, much more liberal principles

which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu law: but they persisted in calling their Codification 'Hindu'. At relevant places in the present study, the scope of improvement is pin-pointed by the researcher.

As regards Christian law, it still remains in a chaotic state. It is unfortunate to note that the Christian Marriage and Divorce Bill made no headway as also the Indian Divorce Act is dreadfully antiquated. The Parsi family laws suffer from dichotomy. The Parsi of the presidency towns and those living outside are not governed by the same law. Their law is partly codified, and the procedure for application of divorce and related relief is not well designed. Very little is known about the family law of the Jewish community living in India. A Jewish wife enjoys limited right to obtain a divorce by application to the Jewish panchayat. This segment of our family law regime has received no attention so far. It needs ardent attention. Even after the codification of Hindu law, the scheduled tribes particularly those who come within the definition of term 'Hindu' are exempted from its operation.

The changes in the world situations have had a great impact on the Islamic world and on Muslim community living outside the world of Islam. In India also there arose a movement of social change which gained momentum much before the declaration of Independence that ushered in an era of social legislation seeking to codify and modify the old marriage laws. The Muslim Personal Law (*Shariat*) Application Act, XXVI of 1937 is the most important legislation in the closing years of British regime in India. The Act almost abolished the legal authority of customs among the Muslims of British India. The position of Muslim

women, in few cases, was seriously undermined by the then prevailing customs. Inheritance in particular had continued to be ruled by custom, often excluding women, among numerous communities of Muslims.

REVIEW OF LITERATURE

Several books, journals, articles, judicial decisions and juristic works which are available in different libraries on the topic, have been reviewed out of which numerous materials referred in the Bibliography have been studied and conclusion has been drawn in this regard. Apart from these materials available on different websites has also been taken into consideration while preparing the synopsis of the thesis.

RESEARCH HYPOTHESIS

The proposed research project plans to tackle the following questions hypothetically. Thus in the area of personal laws the Hindu law was given a sweeping face-lift in mid-fifties. The Parsi law has been amended in 1988 and has been brought almost at par with the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955.

The law of divorce of the Christians is still based on the English statute of 1857. I find a very outmoded law of divorce for the Christians. A few years ago an attempt was made to re-enact and consolidate the Christian family laws, but the move was strongly opposed by the orthodox bishops and was, therefore, dropped. Thus Christian divorce laws still remain extremely uncharitable to the Christian wives. Time and again pleas were made for its reform which had gone unheeded so far.

Considering from the above view points, the present attempt includes, in the main, the following selected enactments of post independent India empowering women for critical analysis:

1. The Special Marriage Act, 1954.
2. The Marriage laws (Amendment) Act, 1976.
3. The Dowry Prohibition Act, 1961.
4. Maternity Benefit Act, 1961.
5. Equal Remuneration Act, 1976.
6. Family Courts Act, 1984.
7. The indecent Representation of women (Prohibition) Act, 1986.
8. The commission of Sati (Prevention) Act, 1987.
9. The National Commission for women Act, 1990.
10. The Muslim Women (Protection of Rights on Divorce) Act, 1986.

Obviously the study extends over varieties of laws and enactments, among religious and secular, substantive and procedural codified and uncodified- directly and indirectly connected with the women empowerment. In fact, these apart, there are a few more laws and enactments dealing with personal laws nevertheless only laws with wider scope of application have been considered and discuss critically. Those with limited scope have not been included for the purpose of this thesis.

RESEARCH METHODOLOGY

To accomplish the aims of the research the following libraries

Library of Indian Law Institute, New Delhi Supreme Court Library, New Delhi Seminar Library of Bar Council Library of Faculty of Law, M.D.U. Vasansi Jha Library of Law Seminar, Faculty of Law A.M.U. Aligarh The Library of Dr. Ambedkar Chair of Legal studies and Research, Department of Law, A.M.U. Aligarh Maulana Azad Library, A.M.U. Aligarh Library of Department of Sociology, A.M.U. Aligarh, Library of Department of Adult Education Study and Research of the Department of Women, A.M.U. Aligarh Library of the Department of Political Science, A.M.U. Aligarh Library of Mechanical Hiram Lucknow Library of Dharwad Sanskrit Library of Parliamentary Studies New Delhi have been utilized for the purpose of this thesis.

Research methodology is meant to be effective tool to accomplish the [illegible] research study and research [illegible] Research Methodology [illegible] adopted throughout [illegible] without this [illegible] library based [illegible] the aims of our society striving with [illegible] [illegible] measurements [illegible] [illegible] [illegible]

RESEARCH METHODOLOGY

To accomplish the task, the researcher has utilized the following libraries:

Library of Indian Law Institute, New Delhi; Supreme Court Library, New Delhi; Sapru Library of New Delhi; Library of Faculty of Law, B.H.U., Varanasi; The Library of Law Seminar, Faculty of Law A.M.U., Aligarh; The Library of Dr. Ambedkar Chair of Legal studies and Research, Department of Law, A.M.U., Aligarh; Maulana Azad Library, A.M.U., Aligarh; Library of Department of Sociology, A.M.U., Aligarh; Library of Department of Advance Study and Research of the Department of History, A.M.U., Aligarh; Library of the Department of Political Science, A.M.U., Aligarh; Library of Nadwadul Uloom, Lucknow, Library of Devband, Saharanpur, Library of Parliamentary Studies, New Delhi have been duly utilized for the purpose of this thesis.

Research methodology is treated to be effective tool to achieve the result. In process of the present study and research, the 'Doctrinal Research Methodology' is adopted focusing on materials available in different libraries. It is a library based research relying on leading libraries of our country dealing with books, treatises, journals, Acts, legislations, enactments, commentaries, approaches of social reformers, social activists and social scientists.

RESEARCH PLAN

Introduction apart, the total attempt in the shape of the present work has been divided into four parts namely: Part-I Women

government in Tennessee. Cooperative Analysis. An unlikely no cooperative *government* was possible in the Chapter-1. Women had Personal Data System in which all discussed in the Chapter-2. Information of Women was explained in Chapter-3. Information of women about personal laws in India *through* multiple transformation religious systems are discussed in Part-II under the following options: Chapter-1 Introduction of Women's Struggle Chapter-2 Processing and Chapter-3 Analysis of Women Part-III Empowerment of Women under Legislations in Pre-Independent India: Evolution of Women Chapter-1 Introduction of Women's Struggle Chapter-2 Analysis of Women and Personal Laws in India Chapter-3 Women and Constitutional Provisions Part-IV Women and Legislations in Post-Independent India: Evolution of Women Chapter-1 Introduction of Women's Struggle Chapter-2 Analysis of Women and Personal Laws in India Chapter-3 Women and Constitutional Provisions Part-V Women and Legislations in Post-Independent India: Evolution of Women Chapter-1 Introduction of Women's Struggle Chapter-2 Analysis of Women and Personal Laws in India Chapter-3 Women and Constitutional Provisions Part-VI Women and Legislations in Post-Independent India: Evolution 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Empowerment in Personal Laws: Conceptual Analysis. An attempt on conceptual analysis of women empowerment has been made in Chapter-1. Women and Personal Law Systems in India are discussed in Chapter-2. Empowerments of women under personal laws in India are explained at length in Chapter-3. Empowerment of Women through different religious systems are discussed in Part-II under the following chapters: Chapter-1 Marriage, Chapter-2 Dissolution of Marriage, Chapter-3 Succession, and in Chapter-4 Maintenance. In Part-III Empowerment of Women through legislations in post-independent India: Evaluation of relevant legislations are explained under Chapter-1 Hindu Women, Chapter-2 Muslim women, Chapter-3 Christian Women and in Chapter-4 Parsi Women. Selected Acts empowering women in post-independent India are critically analyzed in Part-IV like the Special Marriage Act, 1954, the Marriage laws (Amendment) Act, 1976, the Dowry Prohibition Act, 1961, Maternity Benefit Act, 1961, Equal Remuneration Act, 1976, Family Courts Act, 1984, the Indecent representation of women (Prohibition) Act, 1986, the Commission of Sati (Prevention) Act, 1987, The National Commission for Women Act, 1990 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Under the caption of 'Concluding Remarks and Suggestions', the academic exercise and research venture have been done pin-pointing the outcome of the study alongwith possible solutions which the researcher finds appropriate within the framework of this study.

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Part-I

WOMEN EMPOWERMENT AND PERSONAL LAWS: CONCEPTUAL ANALYSIS

Chapter-1:
Women Empowerment:
A conceptual Analysis

Chapter-1

WOMEN EMPOWERMENT: A CONCEPTUAL ANALYSIS

1.1 INTRODUCTORY REMARKS

Women are the bearers of the next generation, the caregivers in the family but they suffer deprivation and maltreatment at every strata of the social set up. The life of average Indian women is still governed by customs, habits, prejudices and unwritten codes of conduct. The Indian society is averse to treating a woman as a human being. The legal equality which, women enjoy under the Constitution and the special privileges are all on papers. Though in their public utterances, men praise the concept of equality and show concern that women should be able to avail of their constitutional and legal rights, yet at heart they are the most conservative. She has a undergo sex determination test to know the gender of the child. She is teased on streets, harassed everywhere, molested in public places but she is mum because of the fear of retaliation from the offender. Most crimes against women go unreported. The condition of women in India cannot be improved by any single method or merely by pronouncing the world 'Women Empowerment'. There is need to change the traditional mental set-up which is deep rooted in the minds of the society only then this concept can turn into reality.[1]

The traditional social structure, equal norms and value systems continue to place Indian women in a situation of disadvantage in terms

[1] Gagandeep Kaur, 'A Real Potrait of the Concept: Women Empowerment' available at: http://ssrn.com, p.2

۱ د. رشید بوزیدی، مدیریت و کنترل سازمان، ترجمه ابوالقاسم پورعزت و همکاران، چاپ ششم، انتشارات سمت، ۱۳۹۰، ص ۱۰۲.

ناظر به کنترل سازمان، در تعریف ابوالقاسم پورعزت و همکاران از مدیریت و سازمان، کنترل عبارت است از: «فرایندی که از طریق آن مدیران اطمینان حاصل می‌کنند که سازمان به اهداف خود دست می‌یابد یا منابع را به طور مؤثر و کارا برای دستیابی به اهداف سازمان به کار می‌گیرد.»[۱]

۱.۳ CONCEPT OF MANAGEMENT

Put into one single sentence, management can be defined as the process of getting things done through other people.

In an economy, the business environment is not unchanging; rather, it is dynamic and ever-changing. Therefore, management is not a single event but a process of continuous activities. Although management is a process, each activity is not necessarily performed in the same order. Management is a dynamic process in which each activity is affected by and affects the other activities. Management is a cyclical process in which the activities of planning, organizing, staffing, leading, and controlling are performed continuously.

Management is the process of planning, organizing, staffing, leading, and controlling the activities of members of the organization and of using all other organizational resources to achieve stated organizational goals.

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of role relationship, decision making and sharing of responsibility. Their social status is still shrouded by a variety of institutional complexes, connections and myths. "The emancipation of women will not be handed over on a silver-plate by some party or political movement". In order to strive for equality, women must express their will to achieve it. Women must fight back for their participation and respond to the demands of progress. No social change can occur without talking about women. Any social change that does not include a change in the position of women is futile and is ultimately bound to fail. President A.P.J. Abdul Kalam in one of his speeches mentioned that the "empowering of women is a prerequisite for creating a good nation, when women are empowered, society with stability is assured. Empowerment of women is essential as their thoughts and their value system lead to the development of a good family, good society and ultimately a good nation". Therefore the empowerment woman is very important not only for the growth and development of the family/society but also to the nation as a whole.[2]

1.2 CONCEPT OF EMPOWERMENT

The role and status of women is a widely discussed and debatable issue in our country. The present position and status of women in general and rural women in particular is not satisfactory rather their position in society is in no way better than second class citizen. Theoretically women are considered important and equal partners in the process of development, but in practice they are generally ignored. In spite of so many statutory productions, women still remain under privileged,

[2] T. Subramanyam Naidu & G. Palaniswamy, 'Rights & Issues of Empowerment of Women in India- A Cross cultural Analysis'. In Neera Bharihoke Rights of Hindu & Muslim Women, (Serials Publication, 2008) pp. 49-50.

under-valued and exploited and various kinds of discriminations continue to persist against them. Women as a group of the human community, their status role and problems have been an important issue of debates among the intellectuals from pretty time.[2]

The women's empowerment has become a social word or a 'buzzword' for a long time. It is a result of several important critical discussions, dialogues and debates generated by the feminist movement all over the world which is widely used but seldom defined. It is crucial to clarify what is empowerment? Empowerment is a word which stands by for the sense of increasing power, gaining control or participating for decision making.

The word empowerment is not listed in the Webster's New World Dictionary but in Webster Collegiate dictionary the word 'empowerment' means to authorize or to give authority. Normally the word signifies about the process by which power is gained, developed, seized, facilitated or given. The word empower is a synthesis of two words 'en' and 'power'. The prefix 'en' is attached to the noun 'power' to create a verb. Thus to empower denotes to give power or authority. Power is a key word of the term 'empowerment'. So to understand the empowerment the understanding of the word power is necessary.

Power is usually understood in two senses:

1. The ability to get what one wants

2. The ability to influence others to do what one believes is

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[2] Nirmala Agarwal, Women Empowerment in India, Deep and Deep Publications Pvt. Ltd. New Delhi, 2000, p. 1.

[3] Sharma Rajni, Empowerment of Women, Deep and Deep Publications Pvt. Ltd. New Delhi.

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[3] Meenu Agarwal, Women Empowerment: Today's Vision for Tomorrow's Mission (Mahamaya Publishing House, 2007) p. X.
[4] Sushma Sahay: Women & Empowerment. Approaches and strategies pp. 17-24, 1998. Discovery Publishing House, New Delhi.

ways that further ones interest

The word empowerment also refers to the organized capacity of individuals or groups to act on their own behalf to achieve a greater measure control over their lives and destinies. Power does not simply be handed over to the powerless group in the society yet it must be developed or taken by the powerless themselves, for which an effective action to obtain it is necessary.[1] "Power does not come from physical or active ... comes from an indomitable will. The driving force ... action lies in the individual along with his or her life plan is known as the will - power."

The word empowerment is defined by various latin legal learning in social contexts in the following ways

... Julie Gutierrez (1992) has defined the concept as "It involves ... developing critical awareness increasing feeling of self-efficacy and developing skills for personal interpersonal ... social change."

According to a noted sociologist Zipp (1992) empowerment expresses a means for accomplishing community development tasks and can be conceptualized as involving two key elements giving community members the authority to make decisions and choices and facilitating the development ... to exercise this power ...

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[1] Ibid
[2] Ibid
[3] Ibid, p. 1
[4] Rubin, Sue, p. 8 ... Approach ...
from ... The ...

ways that further ones interest

The word empowerment also refers to the ongoing capacity of individuals or groups to act on their own behalf, to achieve a greater measure control over their lines and destinies. Power does not likely to be handed over to the powerless group in the society yet it must be developed or taken by the powerless themselves, for which an effective action on behalf of self is necessary.[5] "Power does not come from physical capacity, it comes from an indomitable will. The driving force which impels the individual along with his or her life plan is known as the will to power".[6]

The word empowerment is defined by various jurist legal luminaries and social activists in the following ways.

Lorraire Gutierrez (1995) has defined the empowerment as "it focused on developing critical awareness, increasing feeling of collectiveness and self efficacy and developing skills for personal interpersonal or social change".[7]

According to a noted sociologist Zippy (1995) empowerment represents a means for accomplishing community development tasks and can be conceptualized as involving two key elements giving community members the authority to make decisions and choices and facilitating the development of the knowledge and resources necessary to exercise these choices.[8]

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[5] Ibid
[6] Ibid
[7] Ibid, p. 17
[8] Sushma Sahay: Women & Empowerment. Approaches and strategies p. 24, 1998. Discovery Publishing House, New Delhi.

The most conspicuous feature of the term empowerment is that it contains within it the word 'power'. So obviously, empowerment is about power and about changing the balance of power. Empowerment of women is the keynote of women's movement now-a-days. Empowerment contains the word 'power' which is exercised in economic, social and political relations between individuals and groups. Power may be defined as control over resources and ideology. This definition makes it clear that women in general are relatively powerless because they do not have control over resources and hence have little or no decision making power, yet the decision taken, affects their lives every day.[9]

The concept of empowerment is related to the concept of freedom. Empowerment is equipping one to improve the living condition. It does not identify power of women in terms of domination over others, but in terms of the capacity of women to enhance their ability to gain control over the crucial material and non-material resources and thus minimize their risks. Empowerment approach recognizes the triple role of women namely production, reproduction and community management which manifests itself through the formation and organization of groups.[10]

The movement for women's empowerment was launched in 1996 for taking women with dignity and equality into the next century. The objective of the movement were gender equality, gender justice, social security, elimination of all types of discrimination against women and

[9] Supra note, p. 27
[10] Supra note, pp. 28-29

integration of women into economic development and mainstream of economy.

Women's empowerment is relatively a new concept in the realm of development. It is a process, which changes the existing power relations in favor of the poor and marginalized, among the women. It is a long-term process that requires changes in the behavior and attitudes of women and men and the ideas that societies hold about gender.

The empowerment of women can be defined as "global access to resources, power and decision-making". This is an essential requirement to attain gender equality i.e, the process required for the realignment of power in decision making at the household, institutional and at all levels of the society. The ultimate goal is equitable partnership between women and men, built on the strengths of shared knowledge of the energy, skills and creativity.[11]

The women empowerment is a process that enable woman to gain access to and control of material as well as information resources. The concept of women's empowerment all over the world has its root in feminist movement which in simplest means is the manifestation of redistribution of power that challenges the patriarchal ideology and the male dominance. Empowerment is the key solution of many social problems as the growth of population, environmental degradation, low status of women, perpetual gender discrimination and economic dependence of women etc.

According to Charlton Everett & Standt "Women empowerment is the initial phase of women's liberation, freedom and equality as well as a

[11] Ibid

long range goal of women's liberation freedom and equality. It is the first step in a long journey toward the formulation and realization of human rights and responsibilities that transcend gender role stereotypes and the objectification of women and the men".

Pillai, another sociologist said in 1995 that "empowerment is an active multi dimensional process which enables women to realize their full identity and powers in all spheres of life. Power is not a commodity to be transacted, nor can it be given away in alms. Power has to be acquired, it needs to be once acquired to be exercised, sustained and preserved".

On the basis of above discussion it is evident that empowerment is primarily a goal for some people while others consider it as a form of intervention. To some it is a process of emancipation, therefore is it not something which can be given like alms but it is a process by which people begin to develop their awareness and the ability to organize, to take action and to bring about changes.

Empowerment has become a widely used word which is something overextended Empowerment in its emancipatory meaning is a serious word. It is also a concept which brings out a broader analysis of human rights and social justice. The underlying assumptions are that if women understood their conditions, knew their rights and learned skills traditionally denied to them, they would not only make their lives meaningful for them but the pathology of its lays the foundation for the collective universal development of the society at large.

Rausseau had once observed "Man is born free but everywhere he is in chains" The cannon of this observation has been reflected and

translated as a global phenomenon and has been incorporated as a necessary, essential and sacrosanct conditions of all human lives. The nature has given not only a life to all human beings but a freedom as well to act according to choice and to flourish as a human being.[12]

Empowering women is the basic to the basics of human rights where she wants neither to beg for power nor search for power hierarchy to exercise power against others. On the contrary she demands to be accepted as human first of all. She as a person in command of herself and for that necessarily all the resources physical, social, economical, political, cultural and spiritual to be equally accessible to her, are pre-requites for considering the whole question of empowerment.

Indian society is inherited with male chauvinism but now the society has started to realize women's importance and has accepted women's empowerment, women as an active agent for development, participating in and guiding their own development.[13]

Gandhiji said that women are the companions of men, gifted with equal mental capacities. She has the right to participate in the minute detail of the activities of life and she has right of freedom and liberty with man. But today in India with special reference to the village, we see that by sheer force of vicious customs even the most ignorant and worthless men have been enjoying superiority over women which they do not deserve and ought not to have. We can however see that the trends have changed to a great extent with more and more women coming out and competing with men in many spheres. We can see

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[12] I.A. Khan & Urusa Mohsin "Empowerment of Women through property", Quest for Justice, Vol. II No.1 pp. 15-16, 206-07

[13] .....

today women in all sphere of life with no exception. But majority of these women are from urban areas and only handful are from villages. If this trend has to change, social empowerment of women is a must. Of course this is visible in the matters of fewer rules of socio cultural segregation too. Widows are in most cases today not treated or shunned as inauspicious the way they used to be, two generations ago, however this could be seen in urban areas. In villages we still see the prevalence of certain age old taboos and there should be a change in the social order by which Indian women especially from the rural areas stand as a monumental example of social and cultural emancipation, worth enough of the whole world to take an example.

Human Development directly correlated to people participation and development not only by-passed women but also made them victims of it. Participation leads to empowerment supported by economic and social dependents. It is now recognized that women hold the key to sustainable development. Empowerment of women is the most important aspect that our policy makers should have in mind before embarking upon any scheme, programme, meant for women.[14]

1.3 ELEMENTS OF WOMEN EMPOWERMENT

Following are the in elements of women empowerment in any society:

- Equal opportunity to women for active participation in decision making process at par with men in all walks of life.
- Independent recognition of women for developing and civilizing the full latent of women.

[14] Supra note 2, pp. 48-49.

- Elimination of any kind of discrimination economic and non-economic, based on sex such as wages, employment share in property, status in family and society etc.

- Inculcation of feeling for self pride by women themselves so that they should not feel weak, helpless, powerless comparatively to their counterpart men.

- To provide opportunity of women to determine her own way of life based on her talent, capabilities virtues and likings. Her position should not be determined by her husband, father, brother and son.[15]

Empowerment is a multidimensional process, which should enable the individuals or a group of individuals to realize their full identity and powers in all spheres of life. It consists of greater access to knowledge and resources, greater autonomy in decision-making to enable them to have greater ability to plan their lives, or have greater control over the circumstances that influence their lives and free them from the shackles imposed on them by custom, belief and practices.

Empowerment of women may also mean equal status to the women, opportunity and freedom to develop her. Empowering women socio-economically through increased awareness of their rights and duties as well as access to resources is a decisive step towards greater security for them.

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[15] Deepa Agarwal "Empowerment of Women: Women and Enterpreneurship in Meenu Agarwal Women Empowerment: Todays Vision for Tomorrows Mission p. 291 (Mahamaya Publishing House 2007).

Mikhail Gorbachow said, *"The status of women is a barometer of the democratism of any state, an indicator of how human rights are respected in it".*

Empowerment of women would mean equipping women to be economically independent and personally self reliant, with a positive self-esteem to enable them to face any difficult situation. Moreover they should be able to contribute to the development activities of the country. The empowered women should be able to participate in the process of decision. Women empowerment is a dynamic process that consists of an awareness-attainment-actualization cycle. Again, it is a growth process that involves intellectual enlightenment, economic enrichment and social emancipation on the part of women.[16]

Empowerment aims at making women self confident and self reliant so that they feel secure and are in a position to take their own decisions. In most societies women have to take decisions keeping in mind the well being of their families. It is assumed that being thoughtful, caring and even sacrificing to some extent, does not harm but adds to a woman's power and dignity. The basic condition for empowerment and emancipation is that woman is considered and treated as an individual, with intellect, fundamental right and feelings, similar to that of man. Thus it is hoped that by the turn of the century women will be much better educationally, politically and socially than they are today and consequently will play an effective role.[17]

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[16] Dr. J.C. Pant & Dr. Upasana Sharma 'Suggested Measures for the Empowerment of Women' in Meenu Agarwal Women Empowerment: Today's Vision for Tomorrow's Mission pp. 79-80 (Mahamaya Publishing House, 2007).

[17] Mrs. Rakhi Mittal 'Women's Equality: Still a Dream in Meenu Agarwal Women Empowerment: Today's Vision for Tomorrow's Mission, p. 182.

The concept of empowerment emerged during the U.S. Civil Rights Movement in 1960's after substantial work took place in civil disobedience and voter registration efforts to attain right for Afro Americans with the name of 'black power'.

"It is a call for black people in this country to unite, to recognize their heritage to build a community. It is a call for black people to begin, to define their own goals and to think their own organizations".[18]

Concerning with the women the word empowerment is applied with the women's movement in the mid 1970's. Applied to gender issues the word empowerment began at its international level with Sen and Grown with their book Development, Crisis and Alternative Visions: Third world Women's Perspective (1985) which was prepared for the Nairobi Conference at the end of the U.N. Decade for women in 1985. In this book, a section on "Empowering Ourselves clearly identified the Creation of Women's Organization as central to the design and implementation of strategies for gender informations.[19]

Since the U.N Declaration of the Decade of Women in 1975, the issues concerning women have got preference all over the world but the quest of gender justice in law courts was started about fifty years ago with the question related to person clause, whether the word 'person' includes the women? The answer of this question was consistently in negative till 1929 all over the world.[20] The House of Lords expressly held that women did not fall with in the meaning of term 'person'. The

[18] Carmichal & Hamilton, 1967 Quoted by Digumarti Bhaskara Rao in Women & Empowerment p. 44 (1999) Discovery Publication House.
[19] Ibid
[20] Narain v. Scotish University (1909) AC 147: 100 L.T.

U.S. Supreme Court had already the similar opinion.[21] Though a court in South Africa held otherwise which, was over ruled by the appellate court.[22] In India the full benches of Calcutta High Court[23] and Patna High Court[24] rejected the applications of women for enrolment under person clause in the Legal Practitioner Act. The Allahabad High Court is the first court which recognizes women under the 'person' clause by admitting Cornelia Sorabji as a legal practitioner under Legal Practitioner Act of 24 August, 1921.

At international level the Privy Council[25] admitted it and expressed the obvious in one time: "the word person may include members of both sexes and to those who ask why the word should include females, the obvious answer is why not".[26]

In India with the Civil Disobedience Movement in 1929 the concept of equality of men and women in political, social and economic field were crystallized. Sarojini Naidu said "... It was not for men to give women any rights, nor was it appropriate for men to make decisions for women. Women must begin to exercise there own rights."[27]

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[21] Bradwell v. Illinios (1875) US 162
[22] Incorporated Law Society v. Wookey (1912)
[23] In re Regina Guha IAR (1917) Cal 161
[24] In re Sudhansu Bala Hazara, AIR (1922) Pat. 269.
[25] Edwards v. Attorney General Canada (1929) AII ER 571.
[26] 'Women's empowerment :Some suggestions paper presented by justice Yatindra Singh Judge Allahabad High Court on 11th Dec. 2004 in the conference organized by the national Commission of Women on Women's empowerment vis-à-vis Legislature and judicial Decisions. AIR 2005, Journal 53.
[27] zQuoted from Sugaya C.P. "Women's Rights and Development Policies in India" The Administrator, July-Sept. 1995 p. 13.

In 1929 the demand of a single standard of morality for both men and women and equal rights had been made by the women's Indian Association.[28]

1.4 SEEDS OF THE CONCEPT: WOMEN EMPOWERMENT

In real sense, the seeds of this current phenomenon lie in the past. The positions of women in India have not been very sound in proceeding few hundred years. Manu the father of Hindu Dharma Sutra says about woman:

"Pita raksati kaumare
Bharta raksati yauvane,
Raksanti sthavire putra na
Stri svatantrayamarhati"

The subordination and dependence of women particularly in socio-economic life continued till independence. The word empowerment, although it gained widespread usage in the context of the US Civil Rights and Women's Movements is an extension of earlier concepts of equality, justice and freedom which were expressed in many anti-imperialist and political struggles. These are also enshrined in international agreements and also underlie the precepts of many religious traditions, including Islam. In India several attempts have been made for giving a rich status to women. It is evidenced from the provisions for elevating the status of women in our laws.[29]

[28] Rani P, "Women's Indian Association Movement in Madras 1925-1936: Perception on Women' in Women and Indian Nationalism (1994), p. 103
[29] Supra note 1, p. 4

1.5 PROCESS OF EMPOWERMENT

Implicit in participation is empowerment or transfer of power to the people. Empowering is development of skills and abilities of people to enable them to manage better, negotiate with existing development delivery systems. Some see it as more fundamental and as essentially concerned with enabling people, to decide upon and undertake actions, which they believe are essential to their development. The empowerment process encompasses several mutually reinforcing components but begins with and is supported by economic independence, which implies access to and control over production resources. A second component of empowerment is knowledge and awareness the third is self-image and the final is autonomy.

The women in India have been identified as a disadvantageous group. They form a weaker section and are subject to excessive male domination. For this reason they seldom get a chance to develop their health, personality and participation in development programmes within and outside their home environment. The women form a great-untapped reservoir of human energy that comes out from within the treasure of unlimited human resources as against limited natural resources. The natural and material resources in India are very much limited in respect of its overwhelming population and therefore this country greatly depends on maximum utilization of human resources. India cannot afford to keep the womenfolk aside from making their participation in the process of development. Moreover, the condition of women will not improve unless they get opportunities and make use of such occasions to earn experience, increase skill and efficiency and

prove their ability in discharging their social responsibilities The situation of women as it exists is one of low status of women that are powerless, endangered by development, suppressed by poverty and oppressed by patriarchy. Traditions structures have failed to make room for them as equal partners in the decision-making processes; nor has the system ensured that their interests and concerns are reflected in development plans and local programme.

They are ignorant, unaware and ill informed about how they could live better lives with less drudgery, morbidity and fear of violence. Even though nature has endowed them with superior biological strength, the environment stifles their, development. At every age more women die than warranted to keep the sex ratio adverse in most parts of the country.

The issues of empowerment of women moved centre stage during the last three decades of the second millennium mainly through the efforts of the United Nations by declaring 1975 as the Women's year for the abolition of discrimination against women in centuries where it still exists. The resolution by the United Nations of the International Women's year urged: "to strive for equality between men and women; to promote a higher role of women in the economic, political, social and cultural life of countries; to promote their active participation in the struggle for the development of friendship and co-operation between nations for peace and social process". The decade 1975-82 as the women's decade, this period coincided with the 6^{th} Plan period in India when the approach was shifted from welfare to development and further efforts during the subsequent Plans culminated in the farming of a National Policy for Empowerment of Women approved by the

Cabinet on 20th March 2001. However despite constitutional guarantee of equality and justice, legislative support of a plethora of Acts and introduction of policies and programmes, the goals of gender equality and justice, empowerment of women still remains a distant dream for Indian women.[30]

1.6 SOCIAL EMPOWERMENT OF WOMEN

Women's role in any culture says no words to emphasis. It is obligatory to consider women as a weaker section. Neglect of women power in our society is perhaps the most important cause of our backwardness. The national movement under the leadership of Mahatma Gandhi was one of the first attempts to draw Indian women out of the restricted circles of domestic life into equal role with men, empowerment of women also means equal status to women/Empowering women socio-economically through increased awareness of their rights and duties as well as access to resources is a decisive step towards greater security for them. Empowerment includes higher literacy level and education for women, better health care for women and children, equal ownership of productive resources, increased participation in economic and commercial sectors, awareness of their rights a'id responsibilities, improved standards of living and acquiring *i* elf-reliance, self-esteem and self-confidence.[31] Empowerment is a process of acquiring rights, developing self (personality development) and deciding by self, independently (self decision - making process). It is, in fact, that way of conscience, which paves the way for playing greater active role in

[30] Supra note

[31] Babita Agarwal, Ms Prabha Singh & Mr. Arun Kumar Singh 'Role of Women in Rural Development and Planning Process: A study in Meenu Agarwal Women Empowerment: Today's Vision for Tomorrow's Mission p. 223 (Mahamaya Publishing, 2007).

all spheres of life and simultaneously empowers the person to control and change the major works. In other words, it is a process which is directly related to the power and for to change of power, i.e., the power to control the resources and concepts. When we talk of women empowerment, we mean providing women social, political, economical, and religious rights so that the status of women may become equal to the men in society.

The following may be said to be the objectives of Social Empowerment of Women:

- To increase awareness in women, for their development to use their talent optimally not only for themselves, but also for the society as whole.
- To develop the skills for self decision- taking capabilities in women and to allow them to present their point of view effectively in society.
- To create sound and proper environment for women's pride, prestige and healthy physical and mental development.
- To make efforts in organizing the women for fighting against the problem and difficulties related to them.
- To create awareness among women to be truly ambitious and to dream for betterment.[32]

[32] Dr. Upasana Singh, 'Social Empowerment of Indian Women in Meenu Agarwal Women Empowerment. Today's Vision for Tomorrow's Mission pp. 262-263 (Mahamaya Publishing, 2007).

1.7 EMPOWERMENT OF WOMEN AND EDUCATION

Education is the corner stone of women's empowerment because it enables them to respond to opportunities, to challenge their traditional roles and to change their traditional roles and to change their lives. Education of women benefits the whole society. It has a more significant impact on poverty and development than men's education. It is also the most influential factor in improving the child's health and reducing infant mortality. It also has an effect on family size. The more years of education a woman has, the higher is the degree of her independence. Education would actually accord women certain advantages in areas where women have historically lacked access or differential rights. Education would empower women to achieve many social, psychological, economic and political dreams which are denied to her traditionally.

The policy of the government of India for empowerment and development of women lays emphasis on removal of women's illiteracy and obstacles inhibiting their access to elementary education, women's participation in vocational, technical and professional education at different levels. The government also lays stress on non-discrimination, thus seeking to eliminate sex stereotyping in vocational and professional courses. It actively promotes women's studies as a part of various courses and encourages educational institutions to take up programmes to further women's development and to promote women's participation in non-traditional occupations in existing and emerging technologies.

Equal access to education for women and girls will be ensured. Special measures will be taken to eliminate discrimination, universalize education, eradicate illiteracy, create a gender sensitive education system, increase enrolment and retention rates of girls and improve the quality of education to facilitate life-long learning as well as development of occupational/vocational/technical skills by women. Reducing the gender gap in secondary and higher education would be a focus area. Sectoral time targets in existing policies will be achieved with a special focus on girls and women, particularly those belonging to weaker sections including the scheduled castes/scheduled tribes/other backward classes/minorities. Gender sensitive curriculum would be developed at all levels of educational system in order to address sex stereotyping as one of the causes of gender discrimination.[33]

The single most resource that liberates empowers people is "knowledge" a society, by using knowledge through all its constituents, endeavor to empower and enrich its people and thus will become a knowledge society, a literate women is a sure sign of education of coming generation because a literate woman can never tolerate illiteracy in the house. That is why Pt. Jawaharlal Nehru, rightly pointed out that if education is given to women the it would lead to education of home society and world at large. So it goes without saying that to awaken the people, it is the women who should be awakening first and they should be trained to play an effective role in the walks of life. Education is also a powerful instrument since

[33] Supra note, 2 pp. 34-35

education enables women to gain more knowledge about the world outside, skill, Self-image and self-confidence.[34]

1.8 POLITICAL EMPOWERMENT OF WOMEN

The concept of political participation of women is broader than the one covering women's participation only in the electoral and administrative processes. It includes the whole gamut of voluntary activities with a bearing on the political processes, including voting, support of political groups and communication with legislator, dissemination of political views and opinions among the electorate and other related activities.

Political empowerment of women in India has limited application mainly because of various dubious considerations of social, economic and political variables. Broadly, political participation of women is severely limited due to a nexus of traditional factors; these are the domination of Indian politics by consideration of caste, class, religion, feudal and family status etc., all of which are essentially patriarchal forces that work in favour of men against women. Consequently, women are still left on the periphery of the political process and political participation remains in contesting elections and also capture of some seats of power and influence.

There are several socio-economic constraints by which women have been marginalized. The number of women in leadership position at the local village, district and national level is still not commensurate with their number in society. In India, limited adult franchise was granted to women in 1937, since then, women have been participating in political process as voters as candidates contesting the elections involved in

[34] Supra note 15 p. 290.

deliberations both in State Assemblies and Parliament and also through holding public office at different levels in the judiciary.

Women's participation in formal elections is to a great extent dependent on the mobilization efforts of the political parties, general awareness among the community of the importance of exercising franchise and the overall political culture.

If we have a look at the past history of the women's political participation, we find that no serious efforts appear to have been made to mobilize women as a political pressure group by any political party. In addition, over the years, the number of women contestants in parliamentary elections has not increased. Political parties seem uniformly reluctant to field women candidates. The high cost of the electioneering is another deterrent to most women candidates. Because of these factors there is an increasing tendency among women to contest elections as independent candidates.[35]

Participation in the freedom struggle brought political awakening to our women. Reservations in the local bodies have ensured women's entry into the political process at the grass root levels. There is now a demand to carry these reservations forward into the Assemblies and to Parliament in order to empower women and bring them into leadership positions. But empowerment is more than political participation. Women have to be equipped to help themselves, they have to be made aware to their rights and enable to discover their own potential.[36]

[35] Supra note 2, pp. 45-46
[36] Supra note 2, p. 35.

The Political component of empowerment includes the ability to organize and mobilize for change. Generally the political participation of women simply means to elect representative to caste vote on issue, to campaign and to decide matters. But to contest an election is the highest level of participation according to Rush and Althoff.**26** Women's participation in world politics is very low as compared to men. Politics has been from the very beginning of the human civilization, the domain of males and women's regime is inside the home. They are not supposed to indulge in 'public-life'. Politics being highest expression of public life was thought to be unfit for women. Barring handful of women who could make it up to the top their country's politics, there was a strong struggle for women to come at par with their male counterparts.

In India gendering in politics is very strong. As a result the women's representation in politics is very less and those who are in politics are mostly from upper caste or upper stratum. When 33% seats reservation bill for women was presented in the Parliament, it was depreciated by the male members of Parliament. Recently, All India Women's Conference, Centre for Women's Development Studies, Forum for Right of Children, guild of Service, National Programme of Muslim Women's Forum and Young Women's Christian Association have given an ultimatum to the UFA Government that they are not in mood to back the postponement of the Women's Reservation Bill as it has not been included in the list of monsoon session and threaten that if the demand is not fulfilled the campaign will intensify and spread to all parts of the country.[37]

[37] The Hindu 1st April 2006, p. 13

1.9 EMPOWERMENT OF WOMEN: ECONOMIC PERSPECTIVE

The economic component requires that woman should be able to engage in a productive activity that will allow them some degree of autonomy, no matter how small and hard to obtain at the beginning.[38] Marx and Angles consider economic forces to be the sole detriment of each and every social change. According to these two thinkers the seed of every social change is to be found in some economic circumstances and that without changing in the economic forces there is no social change. According to Marx there is always a conflict between an economic relations and potential economic forces. Kant W. Duch believes that social mobilization is a process in which old social economic and psychological commitments are eroded or broken and people became available for new patterns of socialization and behaviours. So economic component of empowerment is of paramount importance for the upliftment of women.

The feminist movement is one step forward and two step back ward for the common women. There are contradictory forces at work. On one hand there is a progressive thinking which has led to decentralization which is pro-women, on the other hand there is economic onslaught which is detrimental to women. Due to current economic model millions of women are losing their livelihood.[39]

The whole economic paradigm is pulling a premium on being power hungry. A recent survey done in an European country discovered that man on top have successful marriage and children where as the women

[38] Stromquist-cited by Diumarti op.cit., p. 7.
[39] Times of India 2nd 'April 2004, editorial page.

on top are either unmarried or divorcee. So women have to give up every thing while men have every thing. For a successful man a good marriage is an asset but for women it is seen as a hindrance.[40]

There are several reasons including some self imposed as marriage is still the principal detriment of women's position and career choices. Her decisions are influenced by marriage, parenthood and responsibility in home making and expected social responsibilities. They are in search of a professional role congruent with the feminine role expectations. Many term women sacrifice their career for the sake of their spouses and children. The women income is still considered a secondary to that of husband.

Capitalism in many ways supports patriarchy because of the dependence of a woman on men for financial security. Men think that they can subject her to object of humiliation just because of that security. It is necessary that women should be aware of the importance of being financially independent and can equip them with self esteem and self reliance. As divorced women have been almost totally at financial mercy of their husband and can literally find themselves homeless, They are bound to live with her despotic husband and endure bad marriage rocked with physical violence and mental abuse without a whimper. At last the economic empowerment of women are the most important for gender justice and upliftment of feminism.

Cultural traditional and economic necessity has always meant a significant role for women in agriculture. In India, it is not uncommon that women do not have control over the land. Even, where women

[40] Kamala Bhasin (The pioneer of fair movement in India) "Fair Movement" Times of India 2nd April 2004 editorial page.

constitute a larger share of agricultural produce but there are cultural constraints to easy communication between men and women because almost all extension workers are men. Therefore, the role of agricultural extension workers is very significant. Besides, cultural norms have to be addressed before we tackle other dimensions.

In animal husbandry women have a multiple role. UN estimated 75 million women as against 5 million men are engaged in the Indian dairy sector. Their activities vary widely ranging from care of animals, grazing, fodder collection, banning of animal shed to process milk and livestock products. Though women play a significant role in livestock management and production women's control over livestock and its products is negligible. Though women work in every sphere of the farm sector they are not recognized as farmers. Consequently, they remain outside all agricultural development programmes and services.

Not only do women perform more tasks, their work is also more arduous than that undertaken by men. Both transplanting and weeding require women to spend the whole day and work in muddy soil with their hands. Moreover, they work the entire day under the intensely hot sun while men's work, such as ploughing and watering the fields is invariably carried out early in the morning. Women's work, unlike men's does not involve implements and is based largely on human energy, it is considered unskilled and hence less productive.

Women work longer hours and their work is more arduous than men's. Women's contribution to agriculture -whether it is subsistence farming or commercial agriculture - when measured in terms of the number of

tasks performed and time spent, is greater than men. "The extent of women's contribution is aptly highlighted by a micro study conducted in the Indian Himalayas which found that on a one-hectare farm, a pair of bullock's works 1.064 hours, a man 1,212 hours and a woman 3,845 hours in a year".

Women's participation in income generating activities is believed to increase their status and decision making power with employment. They do not remain as 'object' of social change, but become 'agents' of social change. They cease to be only 'consumers' of economic- goods and services but true 'producers'. They participate in social reproduction as well as reproduction of labour for the next generation.

The economic contribution is related to their status and role in the family and in the society. If a woman is not economically self-dependent, she can never claim an equal status with man. The problem of poverty cannot be tackled without providing opportunities of productive employment to women. Even where there is a male earner, women's earning forms a major part of the income of poor household. Moreover, women contribute a large share of what they earn to basic family maintenance than men; increases in women's income translates more directly into better child health, nutrition and family well being.

Women's participation in the labour force also brings about changes in awareness and attitudes, which may have long-term benefits such as access to health and education programmes, reduction in birth rates, thrift and savings etc., Economic independence of women will create far reaching social changes and prove as a necessary weapon for them to face injustice and discrimination.

One of the pre-requisites to promote empowerment of women is promotion of organizations among women. Women can be organized through a variety of means namely through formation of co-operatives, Mahila Mandals, Self Help Groups and the like. Through collective action, women can be empowered socially, economically and politically. Organizational behavior of the women's group was the major influencing factor contributing to the success of the economic pursuits.

The goal of poverty reduction and empowerment of women can be effectively achieved if poor women could organize into groups for community participation as well as for use of their rights in various services related to their economic and social well-being.[41]

Hence, it is the right time to make sincere efforts to break the Vicious circle. Poverty in India can be elimination to a long extent and the general status of women in the society will be enhanced if this vicious circle is broken. Women empowerment should directly connect to the family, society and country. The cruelty with women is very painful, for her' and her family and also shameful for society and country. A single crime with women reverses all forwarding steps of other women and the chain of development breaks up. These should be a positive change in attitude of man, society, religion and government so that woman can be given a fair chance to develop without any fear.[42]

In recent years, empowerment of women has been recognized as a central issue in determining the status of women. Empowerment

[41] Supra note 2, pp. 40-42.
[42] R.C. Agarwal, K.D. Gaur & Dr. Meenu Agarwal. Women Empowerment at A Glance in Meenu Agarwal, Women Empowerment; Today's Vision for Tomorrrows Mission p. 14 (Mahamaya Publishing House, 2007).

covers aspects such as women's control over material and intellectual resources. Empowerment is process, not an event, which challenges traditional power equations and relations. Abolition of gender-based discrimination in all institution and structures of the society and participation of women in policy and decision making processes at domestic and public levels are few dimensions of women empowerment. In 1995, the human development report quoted that out of 1.3 billion poor people living in developing countries, 70 per cent are women. Poverty among rural women is growing faster than among rural man. Over the past 20 years, for example, the number of women in absolute poverty rose by 50 per cent as against some 30 per cent for rural men. Women in India form 89 per cent of the informal and unrecognized sector. It is fact that women are capable to play their role in economic development like the men at least equally well if not better. The success of all programmes aiming at to allow women to play her proper role in economic development would depend on increasing women's participation, particularly on actual target groups to move from empty generalizations to concrete measures and to increase women's self reliance and determination to play more active role in the development process.

Countries that hope to be in the vanguard of economic development and social change should accord women as high a status as that of man to enable them to play the necessary complimentary role in the progress of the national. Women are the core of development in India. The striking characteristic of Indian women is the multiplicity of their role in development but is unrecognized. After centuries of neglect, the past two decades have seen unprecedented human development efforts

contributing greatly to rapid progress in building women's capabilities.[43]

1.10 WOMEN EMPOWERMENT THROUGH LAW

For centuries, women in this country have been socially and economically handicapped. They have been deprived of equal participation in the socio-economic activities of the nation. The Constitution of India has taken a long leap in the direction of eradicating the lingering effects of such adverse forces so far as women are concerned. It recognizes women as a class by itself and permits enactment of laws and reservations favouring them. Several Articles in the Constitution of India make express provisions for affirmative action in favour of women. It prohibits all types of discrimination against women and lays a carpet for securing equal opportunity to women in all walks of life, including education, employment and participation.

In spite of all these developments, the truth remains that widespread violations of women's rights continue to persist. The forces of globalization and extremism and the unwillingness of other segments of humanity continue to pose a threat to women's human rights. The law cannot change a society overnight, but it can certainly ensure that the disadvantaged are not given a raw deal. The courts can certainly go beyond mere legality insulating women against injustice suffered due to biological and sociological factors.[44]

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[43] Supra note 31, pp. 224-225

[44] Dr. Hari Mohan Mittal: Domestic Violence against women in India: A Study in its Legislative & Judicial Trends in Meenu Agarwal Women Empowerment: Today;s Visoin for Tomorrows Mission Mahamay Publishing House, 2007) p. 48.

The constitution declared India to be a Sovereign Democratic Republic based on the four pillars of justice, liberty, equality and fraternity.

The principles of gender equality and equity and protection of women's right have been the prime concerns in Indian thinking right from the days of independence. Accordingly, the country's concern in safeguarding the rights and privileges of women found its best expression in article 14, 15, 15(3), 16, 39 and 42 of the constitution. Article 51(A) (C) imposes a fundamental duty on every citizen to renounce the practices derogatory to the dignity of women. To make this *de-jure* equity into a defect, special legislations have been enacted from time to time in support of women. The concept of women development envisaged as 'welfare oriented' in the early phase of our planning era was subsequently shifted to development oriented" during 1970's which started recognizing women as participants of development. The current phase of planning, marking a shift from development to 'empowerment' of women, envisaged that the women must be enabled to function as equal partners and participant in country's development process. With the changing concept of women development, government adopted various plans and programmes for the upliftment of women in India.

Social legislation has been passed to improve their status and rights of women. Special steps are taken to improve their education, health facilities, economic position, marriage act and for their proper participation in family and community life.

The legislation which has been passed after independence to bring women at par with men is based upon our constitution. To remove all

the anomalies in the rights of men and women, the Hindu Code Bill, which covered all the aspects regarding the rights of women, was presented to parliament in 1948, but due to strong opposition from orthodox section, the same could not be passed in toto. Later, this legislation was passed in a piecemeal manner to improve their position.

The various laws made are the Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956.

Under the Hindu Marriage Act, the rule of polygamy has been put to an end and the right of divorce has been given to both males and females. Under the Hindu Succession Act, widows have been given full rights over their property. Besides, the mother and daughters have also been given equal rights in property with the sons. Under the Minority and Guardianship Act, the custody of a minor child under the age of five years shall ordinarily be with the mother instead of the father. Under the Hindu Adoption and Maintenance Act, a woman can adopt the son in her own name. Both male and female can be adopted, and in case the wife is alive, the husband will have to take the consent of his wife in adoption. Thus, in many respects the rights of women have been brought at par with men.

The socio-economic programme, started on a modest scale in 1958, has become one of the principal programmes of the Central Social Welfare Board as it helps in social and economic betterment of a large number of women and the disabled. Under this programme financial assistance is provided to voluntary welfare institutions to organize a wide variety of income generating projects for the benefit

of needy women and the disabled persons who are provided with full time or part-time jobs. Assistance is also provided in the form of grants or loans through voluntary organizations to eligible candidates for self-employment.

After 1958, Medical Termination of Pregnancy Act, 1971; Equal Remuneration Act, 1976; Child Marriage Restraint Act, 1976; Immoral Trafficking (Prevention) Act, 1986 and Pre-natal Diagnostic Technique (Regulation and Prevention of Measure) Act, 1994 etc. has been passed to safeguard of women empowerment.[45]

Recently, Government has now empowered Indian women with a law to protect themselves from violence of any kind occurring within the family, and equal property right in the paternal estate.

1.11 LEGISLATION AGAINST DOMESTIC VIOLENCE

Some forms of violence like rape and wife-beating are recognized as universal forms of violence. Others like dowry, sati and female foeticide are perpetuated by specific cultures and communities.

Therefore, there are reasons to cheer the passage of the protection of women from Domestic Violence Bill, 2005 by both houses of parliament. This path-breaking legislation seeks to protect women from all forms of domestic violence and check harassment and exploitation by family members or relatives. Women will now be able to take legal action against abusive husbands and those who harass them.

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[45] Dr. Upasana Singh: Social Empowerment of Indian Women in Meenu Agarwal Women Empowerment: Doday's Vision for Tomorrow's Mission p. 263-264 (Mahamaya Publishing House, 2007).

Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The Bill is an important step in fulfilling the promise of legislation against domestic violence and gender discrimination made to women by the UPA government under the Common Minimum Programme.

August 24, 2005 the Union Minister of state for Human Resource Development Ms. Kanti Singh, assured that the Bill would not disturb equations within the family. The Bill, she said, was aimed at empowering women and liberating them from the cycle of violence, not from any one individual.[46]

1.12 EQUAL PROPERTY RIGHT

To give equal right to daughter as son in the ancestral property has came into force with its notification on September 09, 2005. The Hindu Succession (amendment) Act 2005 was passed in the assembly and by coming this act into force, both son and daughters now have equal right in ancestral property. In The Hindu Succession Act 1956, para 6, the girls of Hindu families were discriminated and they were seriously overlooked. This act not only deprived the girls from their ancestral property but also was partial on the sexual basis and also deprived from the basic rights of similarity given by the constitution.' As The Hindu Succession (amendment) Bill has been passed, the para 6, of The Hindu Succession Act 1956 has been amended and like the boys, now the girls also got the equal right in the ancestral property.

Though the amendment in the para 6, where the girls got equal right in the ancestral property and the self-occupied property, there at the

[46] Id. P.

same time the married daughters will also get their share in the property. Till now it was applicable only to unmarried daughters only. With another amendment like the children of son, the children of daughter will also be treated equally.

It can be highlighted that mere legal or institutional equality alone cannot guarantee implementation of equal rights to women unless the urge among women themselves to end the discrimination is developed. The role of voluntary organizations is to strengthen the process of women empowerment. Proper training of women in improved technology and trade unions among female workers are steps that may be advocated for.[47]

1.13 SOCIAL LEGISLATION IN INDIAN PLANNING

Different Five-year Plans have consistently placed special emphasis to improve the conditions of women and to increase their access to and control over material and social resources and also integrate them in economic development process in India. A series of social legislation have been enacted from time to time for raising the status of women in the country.

The Five-year Plans also consistently placed special emphasis on providing minimum facilities integrated with family welfare and nutrition for women, acceleration of women's education, their increase in participation in work force and welfare services for women are needed. Various welfare and development schemes have been introduced form time to time to improve the living conditions for women. Special steps have been taken to remove legal, social and

[47] Id. P.

other constraints to enable them to make use of their rights and new opportunities becoming available for them.

The Eighth Five-year Plan intends at enabling women to function as equal partners and participants in development by extending the services to women both qualitatively and quantitatively. Moreover, the plan also aims to effectively implement social legislation for women by formulating and strengthening women's group at grass-root level.

The Ninth Five-year Plan, aim for empowering women as the agents of social change and development. Formation of National Commission for Women (NCW) and idea of setting up of a National Council for Empowering of Women are encouraging steps in this direction. Actual formation and functioning of National Commission for Women (NCW) started in 1992. Moreover, the effort to formulate the National Policy for empowerment of women and setting up a National Resources Center for Women are other steps taken for the development of women and child development. The progress of women and of the society seems to have retarded. Even after forty years, examples galore where on the one hand the sensitivity over women's issues is lacking and on the other hand atrocities against women are rising.[48]

The Committee on Status of Women in India (CSWI) recommended as early as in 1975, the setting up of a National Commission for Women (NCW). Many women activists and organizations also pressed for the demand and finally parliament passed the act in 1990 for setting up a women's commission. Actual formation and functioning of National Commission for Women (NCW) started in 1992.

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[48] Id. P.

The National Commission for Women (NCW) has been designed as a watch dog on how the various government sectors perform vis-a-vis gender justice.

Women related issues have many dimensions but they can be summarized as violence, denial and deprivation. Violence, can be paternal or matrimonial house, or at work place or elsewhere in the society. Denial comes as denial of the right to be born, or denial of nutrition, education, health, home, property etc. Deprivation, results from debarring them from several opportunities of empowerment-political, economic or carrier-wise. The commission has some programmes -

1. Providing funds to voluntary organizations, academicians and other bodies.

2. The programme of legal literacy camp is designed to organize a three-day legal awareness for a group of nearly 50 women by any organization.

3. The third programme is the programme of public hearing under which hearing is given to a group of 30 or more women who are affected by a typical situation at one or more places.

4. Funds are also given for holding seminars/workshops on topics relevant and important for women's questions.

5. Funds are also given to academicians to carry out survey and other studies.[49]

[49] Id. p.

1.14 WOMEN'S EMPOWERMENT YEAR

With improved social status of women, their claim to educational opportunities also received greater attention in the past few decades. The education of women will make available to the country a wealth of capacity that is now wasted through lack of opportunity.

A plan of action for the empowerment of women with measurable goals to be achieved in a time of the next 10 years is being formulated in consultation with the State Governments and various Ministries and Departments of Government of India.

The Government of India had declared the year 2001 as the year of Women's Empowerment. The year was formally launched by the Prime Minister in a function held at Vigyan Bhawan on 4th January, 2001 when he also awarded the first "Stree Shakti Puraskar" to five distinguished women from the grassroots who had made outstanding efforts for the social, educational and economic empowerment of women in remote and difficult areas.

The purpose of declaring the year 2001 as the Women's Empowerment Year was as follows -

1. To create and raise large scale awareness of women's issues with active participation and involvement of all women and men.
2. To initiate and accelerate action to improve access to and control of resources by women.
3. To create an enabling environment to enhance self-confidence and autonomy of women.[50]

[50] Ibid.

The Government approved, for the first time a National Policy on Empowerment of Women in order to mainstream gender into all activities of the Government and other agencies.

The main objectives of the policy are:

1. Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential.

2. The *de-jure* and *de-facto* enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres -political, economic, social and cultural.

3. Equal access to participation and decision making of women in social, political and economic life of the nation.

4. Equal access to women to health care, quality education at all levels, carrier and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office, etc.

5. Strengthening legal systems, building and strengthening partnerships with civil society, aimed at elimination of all forms of discrimination against women.

6. Changing societal attitudes and community practices by active participation and involvement of both men and women.

7. Mainstreaming a gender perspective in the development process.

8. Elimination of discrimination and all forms of violence against women and the girl child.[51]

1.15 CONCLUDING REMARKS

Empowerment is a very broad term encompassing all type of empowerment such as education economic, social, political, legal and cultural empowerment women. The world declaration in world conference in 1990 laid emphasis on "Education of all" lays stress on universalizing access and promoting equity, the two issues which are vital to empowerment of women.

The process of women empowerment is thus concerned with changing the power relations between individuals and groups in the society and involves awareness raising building of self confidence expansion of choices, involvement in decision making and increased access to and control over resources unless they themselves become conscious of the oppression met out to them and show initiative both to push forward. It would not be possible to change their status much some of the employment mechanisms could be identified as follows:

- Literacy and higher education.
- Better health care for herself and her children.
- Higher age of marriage.
- Greater work participation in modernized sector
- Necessary financial and service support for self employment.
- Opportunities for higher positions of power
- Complete knowledge of her rights and above all.
- Self-reliance, self respect and dignity of being a women.

[51] Ibid.

Empowerment is envisaged as an aid to help women to achieve equality with men or, at least, to reduce gender gap considerably. Empowerment would enable women to perform certain social roles which they cannot perform without it. This would mean helping women to enjoy their constitutional and legal right of equality. Though men and women are declared to be equal before the law and though discrimination on the bases of sex is forbidden by the constitution it is common knowledge that women are still at disadvantage in many areas of life. Indeed one could even say that the position of women in India has not improved much since the enactment of the Constitution when it comes to the issue of gender justice.

Chapter-2:
Women and Personal Law Systems in India

Chapter-2

WOMEN AND PERSONAL LAW SYSTEMS IN INDIA

2.1 INTRODUCTORY REMARKS

In India family laws are called personal laws. The laws are personal in that they relate to the sphere of personal relation but also in that they are person-specific. The specificity flows primarily from religious affiliation, though local custom is also important. As a result, family laws are hived off from the main body of civil law, codified separately for four communities-Hindus, Muslims, Christians, and Parsis-based on their religious prescriptions. In reality, the four codes are a mix of scriptural sanctions, heterogeneous customs and practices, and most important precepts forwarded and established through the political maneuverings of powerful spokespersons from these communities. Thus the laws necessarily reflect patterns of social political dominance based on religion, caste and gender.

"Personal laws define the relationship between men and women with the family and control and direct marriage, divorce, maintenance, guardianship of children, adoption, succession and inheritance. All four codes concern women intimately, and all treat women as subordinate to and dependent on male kin. The male is considered the head of family, and women do not have equivalent rights, especially to property."[1]

[1] Nandini Chavan and Qutub Jehan Kidwai, Pesonal Law Reforms and Gender Empowerment: A debate on Uniform Civil Code, Hope India Publications, 2006 p. 268.

2.2 PERSONAL LAWS IN INDIA: MEANING AND SCOPE

"Personal laws are codified separately for the four religious communities-that is, they are not just customary or communal law, but also statutory law based on religion. As a secular nation-state, India maintains these religious laws alongside secular laws, civil, criminal, all of which are administered by the same legal judicial apparatus."

Personal law (i.e. laws covering family relations, marriage, divorce, inheritance, custody rights etc) is a contested arena for women empowerment. It not only defines the relationship between men and women in marriage and family relations but also marks the relationship between women and the state while civil and criminal laws in post independent India are secular, personal laws are governed by the respective religious laws.[2]

By systems or regimes of personal law, we refer to legal arrangements for the application within a single polity of several bodies of law to different persons according to their religious or ethnic identity. Personal law systems arc designed to preserve to each segment its own law.[3] In the last several centuries, the most prominent instances have been personal law regimes in the areas of family law (marriage, divorce, adoption, maintenance), intergenerational transfer of property (succession, inheritance, wills), and religious establishments (offices, premises, and endowments)." Such personal law typically co-exists with general territorial law in criminal, administrative, and commercial

[2] Seema Qazi, Muslim Women in India, Minority Rights Groups International, 1999, p. 20.
[3] M.B. Hookes, Legal Plusatism: An Introduction to Colonial and Neo-Colonial Laws (Oxford, Clarendon Press, 1975.

matters.[4] On occasion, some commercial or criminal rules may be included in personal law.

In India, the British raj established a general territorial law that operated in a common law style and was administered in a nationwide system of government courts." Over time, through infusion of common law and codification, the substantive law came to resemble its British counterpart.[5] At the same time, the British preserved enclaves of personal law. The Bengal Regulation of 1772 provided that in suits regarding inheritance, marriage, caste, and other usages and institutions, the courts should apply "the laws of the Koran with regard to Mohammedans, and those of the Shaster with respect to the Hindus. Under the British, the personal laws of Hindus and Muslims were administered in the regular courts by judges trained in, and familiar with, the style of the common law. Until about 1860, the courts had attached to them "native law officers," pandits and kazis, to advise them on questions of Hindu and Muslim law respectively. To make the law more uniform, certain, and accessible to British judges—as well as to check the discretion of the law officers—the courts relied increasingly on translations of tenets, on digests and manuals, and on their own precedents." In 1860, when the whole court system was rationalized and unified, the law officers were abolished and the judges look exclusive charge of finding and applying the personal law. These religious law systems were now reduced to texts severed from the living systems of administration and interpretation in which they were earlier embodied. Refracted through the common law lenses of judges

[4] John, H. Mansfield, Personal Laws or a Uniform Civil Code in Robert Baird, ed. Religion and Law in Independent India (New Delhi: Manohar Publishers, 1993, p. 139.
[5] Tohir Mahmood Pesonal Law in Crisis, pp. 42-43 (New Delhi, Manohar, 1986).

and lawyers, and rigidified by the common law principle of precedent, there evolved distinctive bodies of Anglo-Hindu and Anglo-Muslim case law.[6]

These bodies of personal law were administered by the courts of British India and (later) independent India. The Constitution of 1950 appears to envision the dissolution of the personal law system in favor of a uniform civil code. After the Constitution came into force in 1950, the continued administration of separate bodies of personal law for the various religious communities was challenged as a violation of the right to equality guaranteed by the Constitution, The Indian courts upheld the continued validity of disparate personal law and the power of the state to create new rules applicable to particular religious communities. The judges in the leading case[7] —a Hindu and a Muslim, both distinguished legal scholars as well as prominent secularists— were sanguine about the continued existence of personal law, presumably in anticipation of its early replacement.

While retaining the personal law system, independent India introduced a note of voluntarism, The Special Marriage Act of 1872 had provided a code of general law under which couples could choose to marry and divorce, hut in under to utilize this option they had to affirm that neither was a Christian, Jew, Hindu, or Muslim. In effect they had to renounce their religious and property relations with their families. In 1954, Parliament passed anew Special Marriage Act that eliminated the onerous renunciatory costs of availing of civil marriage.[8]

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[6] Marc Galanter and Jayanth Krishman, Personal Law Systems and Religious Conflict: A comparison of India and Israel in Gerold J. Larson (ed) Religion and Personal Law in Secular India: A call to Judgment , Indiana University Press, pp. 272-273.

[7] State of Bombay v. Narasu Appa Mali AIR 1952 Bom, 84.

[8] JDM Derrett, Hindu Law Past and Present (Calcutta: A Mukharjee & Co., 1957) p. 74.

India retains a system that governs certain family matters of Hindus, Muslims, Parsees, and Christians by their respective religious laws. There is also a set of religiously differentiated public laws regulating religious endowments. While personal law in India covers issues of adoption, succession, and religious institutions,[9] marriage and divorce are the main focus of public attention. Twelve pieces of national legislation deal with particular issues of marriage and divorce for the various religious groups in the country.[10] The administration of these personal laws in India remains in the hands of state judges.

It is submit that India's personal law system is not associated with much conflict within the several religious communities. Political conflict in India over personal law appears more prevalent between, rather than within, religious communities. This is not to say, however, that interreligious dissension is entirely absent in India. Debate about women' rights in their respective personal law systems is present within the Hindu, Christian, and Muslim communities- many Hindu women who champion equal rights for women support drastic reforms within (if not a complete abandonment of) Hindu personal law. Many Indian Christian women, similarly, struggle and protest against the obstacles Christian personal law poses for women who seek divorce. And there is a series of feminist critiques of Muslim law's treatment of women in divorce and maintenance.[11]

[9] Derrett, Religion, Law and State in India, p. 328.
[10] AIR (2004) Cal. 185.
[11] Anika Rahman, Religious Rights versus Women's Rights in India: A Test case for Human Rights Law, Columbia Journal of Transnational Law (1990), Vol. 28 p. 473.

2.3 SOCIETY AND LAW IN THE HINDU TRADITIONS

The relationship between law and Hindu society involves both the actual and the ideal. To the extent that particular laws are related to a particular society, they can be regarded as a reflection of its value system. But law (both customary and codified) were also seen as a means of controlling society and, as such, an attempt has been made to perfect the legal framework, which then becomes a reflection of-the aspirations of society in which these laws were evoked.

In the Hindu and Buddhist traditions this framework can be deduced from a number of texts and documents, most of which were composed in the period between 400 B.C. and A.D. 500, much of the later literature is in the nature of commentaries on the earlier works, which reflect relevant changes in both society and its laws.

There are two approaches to an attempt at understanding humane in these traditions. First of all, the metaphysical aspect provides a framework of a rather generalized kind emanating from a small group of thinkers. Metaphysical thought certainly contributes to the ethos of a society, but this contribution becomes fairly diluted by the time it reaches the concrete reality of a legal code. The second and more significant aspect of the study is provided by the law books themselves, which draw a more distinct picture of the legal framework. However, reliance, even on such definite sources, 15 not without its dangers. The Law books are both a reflection of early Indian society as well as attempts at working out what was believed to be a perfect social system. Therefore, the aspirations of the lawmakers are also to be considered. Nevertheless, the danger can be mitigated somewhat by

testing from historical sources the actual validity of the legal systems codified by lawgivers.

Hindu law was first formulated in a tribal society and it was based on customary practices and relationships. As is frequent in kin-societies, social control had the force of law. The central problem at this stage was to maintain peace between the tribes rather than to protect the rights of the individual.

The acceptance of a monarchical system by these tribes introduced two new features. The political structure required by kingship encouraged an element of authoritarianism amongst the lawmakers. The close association of kingship with divinity was projected into the realm of law and provided a supernatural sanction for it whenever necessary. The status of the individual in society came to be conditioned by these new factors.[12]

2.4 DHARMA AND LAW

Briefly, Dharma refers to the norm of conduct and of duties on each man in accordance with his caste. It derives from both legal treatises of the past (often regarded as sacred texts) and from approved custom, particularly that which is not opposed to the sacred texts. The idea of Dharma is fully articulated in the theory of Varna-asrama - Dharma, where the definition of one's duty has reference not only to one's caste but also to the particular stage in every stage of life. Gradually, Dharma becomes the most significant concept in the Hindu tradition and the very basis of the status of the individual in Hindu society. Individual acts according to the rules of his Dharma meant that a man

[12] Supra Note 1, pp. 48-50

must accept his position and role in society on the basis of the caste into which he was born and the norms which had been set for that caste by the authors of the law books. Duties implied obligation and stress was far more on obligation than on rights. This tendency was further emphasized by the strongly patriarchal character of the family unity.

Dharma was essential because it promoted individual security and happiness as well as the stability of the social order. Each man's dharma had its own role in the larger and more complex network of the social structure. Therefore, by observing the rule of his own dharma a man was showing an awareness of others in society as well. If individual members of society tried to formulate their own rules of dharma the result would be a chaotic society. Dharma was the foundation of individual and collective security since a state of nature without law was equivalent to anarchy. The fear of anarchy led to the elevation of dharma to divine status and this in turn gave it even higher status than the king and the government. To further safeguard the position of dharma another concept was introduced that dharma is protected by danda (literally a rod or staff, signifying punishment).

The lawmakers who were by and large members of the Brahman caste and who naturally tried to maintain the superiority of their caste formulated the rules of the dharma. Inevitably since they were the ones who gave definition to dharma, the innate superiority of the Brahman was ex-rounded. As a complement to this, it was necessary to formulate a system of social hierarchies. Social and often economic and legal privileges decrease with each descending step in the social hierarchy. Certain categories of Brahmans were immune from the more extracting labours of routine living such as paying taxes, and could on

occasion be regarded as above the law. The concept of dharma rooted in caste was extended to every aspect of human activity. It was logical therefore that the equality of all before the law was not recognized. According to the law books judicial punishments were required to take into considerations the caste of the offender Rights were extended primarily to the privileged upper in castes. The lower orders had only obligations. The burden of society fell almost heavily on the shoulders of the *shudras* and the untouchables who could claim hardly any privilege of rights.

An important characteristic of caste is that an individual is born into a particular caste and cannot acquire the status of any other caste. This resulted in a check on individual social mobility. It also came to be associated with a basic religio philosophical concept of Hinduism, that of Karma which maintains that one's deeds and activities in one's present incarnation determines ones status and happiness in the life to follow. Thus a man's caste status was entirely of his own making and he was in a position to improve it by conforming to dharma and being reborn at a higher status in his next incarnation. It also acted as a powerful check on nonconformity through the fear of worsening one's condition in future incarnations.

Among the various means of maintaining the purity of the caste two are specially stressed: the ban on commensality among members of various castes and the strict observance of rules of endogamy and exogamy as applied with reference to caste. The rules of marriage were rigidly enforced and marriage was primarily a social institution. The lower the status of women the stronger was the legal tie of marriage. The patriarchal system tended to keep the status of women at

low-level, and the emergence of the joint family with special property rights for the male members reinforced male dominance. The family was recognized as a basic unit of society and enjoyed the right to protection by society and the state. This was accentuated in the case of families who owned land and worked on it. The concept of property in the Hindu tradition was usually associated with the ownership of land. The right to own property was granted to those who could afford it. The Law books maintain that property is founded on virtue and that the king has a right to confiscate the property of the wicked, of which, however, there is no record in historical record.

The Hindu pattern did not see man and society as antagonistic to each other. The two entities has mutual obligations and a commitment to these obligations would ensure the welfare of all. The Hindu vision was that of an orderly society with each man attending to his appointed task, which would infuse a people with a sense of community and which with its intense loyalty to the social group, i.e. caste would provide both economic and psychological security. The careful classifying of all degrees of social relationships into a well-ordered system was partly to meet the requirements of this vision and partly due to normal tendency of Hindu theorists to classify everything to its minute detail. This carefully worked out socio-legal framework reflected the Brahmanical vision of the perfect society. Those who were opposed to such a vision could take a nonconformist stand by opting out of society perhaps by becoming ascetics or mendicants or by joining a dissident group.[13]

[13] Supra Note 1, pp. 51, 91

2.5 HINDU LAWS UNDER MUSLIM PERIOD

There were two parallel systems of personal law in India during the Muslim period. But minimum influence was exerted by one upon the other. A closer look at things would show, however, that the two personal systems of law though widely different, they were, on doctrinal basis, essentially identical. Both systems had a religious conception of law in the sense that they were ultimately supposed to have been based on divine revelation and that the law bound the kings, the judges, and the subjects alike to carry them out. Both in the Hindu law and the Muslim law the rulers themselves administered justice as far as possible and the exceptionally honest and learned judges appointed by them after serious deliberations and mature considerations did the rest. The adjudication by the rulers was often sought by the people for their quick and impartial decisions. Clearly, both the systems of Hindu and Muslim laws were largely governed by the law. Thus the doctrinal similarities between the two systems played a very important part in avoiding major conflicts and frequent clashes in administration of the law in the country as a whole. The analogy between the Hindu law and Muslim law does not end with the points of similarity regarding the fundamental doctrines. In the developments of these two systems of law as well as in the consideration of the different sources to which they owe their existence also there were essential points of resemblance.

The important sources of Hindu law are the Vedas, the Smritis, the Nibandhas and the commentaries and customs and equity. The Muslim rulers did not interfere with the personal laws of the Hindus. On the contrary they adopted many time-honoured principles and institutions

of the Hindus.[14]

2.6 BRITISH RULE IN INDIA

The powers in the courts of British India to apply the personal laws of the Hindus and the Muslims were derived from and regulated by the statutes of the British Parliament and the central and provincial legislatures of India. The personal laws of the Hindus and Muslims were applied only in some and not all matters. The questions regarding succession, inheritance, marriage and religious usages were decided according to the personal laws of the Hindus and the Muslims, except in so far as some laws were amended by legislative enactments. There were certain other matters in which the personal laws of the Hindus and the Muslims were applied sometimes by the application of the principle of soft justice, equity and good conscience.

In civil disputes between two persons of the same religion, their personal law was recognized, but the disputes were usually referred to their Pandits or (Panchayats) or jurors as was the procedure adopted by the Abbaside Caliphs of Baghdad. The purely Islamic code of governing the laws of inheritance, marriage and other analogous matters of the Muslims did not apply to the Hindus. The Hindus were allowed to be governed by their own laws on these topics of civil law. But criminal law was applied more or less equally to both the Hindus and the Muslims alike for guaranteeing security of life and property. The Hindus in a sense generally enjoyed self-government and the rulers did not interfere with their personal laws and local affairs.[15]

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[14] Supra Note 1, p.65.

[15] VC Sarkar, Epochs in Hindu Legal History, Vedic Research Center, Hoshiarpur, pp. 48, 201-205, 207, 402-407.

2.7 ASCERTAINMENT OF THE PERSONAL LAWS

The necessity to prepare books in the English language on the Hindu and Muslim laws was enhanced further by the Act of 1781 which prescribed the application of the Hindu and the Muslim laws for certain heads of litigation before the Supreme Court of Calcutta.[16] The English Judges wished to master the principles of the personal laws so as to reduce their dependence on the Indian law officers whose honesty and integrity they rated very low. The English Judges, due to their ignorance of these laws, felt very sensitive and uneasy as they thought that they were completely in the hands of the Pandits and the Moulvies, and the best way to avoid this dependence was to have authoritative works in English on these legal systems.

The first steps towards the ascertainment of the Hindu and the Muslim laws were taken by Warren Hastings. A wrong notion appears to have gone abroad that the Hindus and the Mohammedans did not have any definite system of laws and that, whatever laws they had, were all mixed up with superstitions and nothing else. Warren Hastings was anxious to remove this misapprehension from the minds of the people in England.[17] Also, with a view to give confidence to the people, to make it possible for the English Judges in India to have some know ledge of the two ancient systems of law so as to better enable the courts to cases with certainty and dispatch, to guide the decisions of the several courts, and to preclude arbitrary and partial decisions, Hastings projected the compilation of codes of Hindu law and Muslim law, in the English languages, with the best authority obtainable. To

[16] Supra, 98
[17] Supra, 368-74; Also see, Derrett, *op.cit.*, 239

prepare a Code of the Hindu law, the following steps were taken. Ten of the most learned Pandits were invited to Calcutta from different parts of Bengal. The most authentic books on the Hindu law, both ancient and modern, were collected. The original text of the Hindu Code was prepared in the Sanskrit language. The Pandits started their work in May, 1773, and completed it by the end of February, 1775. The, text was then translation into the Persian language, from which an English version was prepared by Nathaniel Brassey Halheid, and therefore, the work came to be known as the Halheid's Code of Gentoo Laws. In this code, the substantive and' adjectival laws (civil and criminal) are mixed up. It is divided into 21 Chapters; most of the Chapters are subdivided into sections, and each section is further subdivided into paragraphs which correspond to the sections of the modern Indian codes. In the preface to the work the author characterizes it as follows: this code-'must be considered as the only work of" the kind, wherein the genuine principles of the Gentoo Jurisprudence are made public, with the sanction of their most respectable Pundits." The author pays tribute to Warren Hastings in the following words:

Wherefore a thought suggested itself to the Governor-General, the Honourable Warren Hastings, to investigate the principles of the Gentoo religion and to explore the customs of the Hindus and to procure a translation of them in the Persian language, that they might become universally known by the perspicuity of that idea and that a book night be compiled, to preclude all such contradictory decrees in future, and that, by a proper attention to each religion, justice might take place impartially, according to the tenets of every sect.

The same motives which dictated the preparation of a code of Hindu Law also induced Warren Hastings to promote the preparation of a comparable work in Muslim Law, so that this law could also be ascertained and some authentic guide furnished to the Judges to handle cases in that area. In the books recommended for this purpose was discovered "a system copious without precision, indecisive as a criterion (because each other differed from or contradicted another), and too voluminous for the attainment for ordinary study." From these a compendium might have been prepared but being a mere compilation, it might not have been regarded as authoritative as the Muslims could treat it as a new code rather than as a revision of the old. The translation of *Futwa Alamgiree* was undertaken. This is a work in the Persian language prepared under the authority of Aurangzeb, But soon it was found that this consisted of a simple detail of cases and decisions, and would do little to develop the principles of Muslim law and hence the project was abandoned. Some learned Mohammedans then advised that a translation should be executed of 'some work which, by comprehending in the same page the dictum and the principles, might serve at once as an exemplar and an instructor; and for this purpose they recommended the *Hedaya* "because of being regarded as of canonical authority, and uniting in an eminent degree, all the qualities required." The work being in the Arabic language was translated first in the Persian language by four learned Moulvies. Then Hamilton translated it into the English version.

These two translations, one on the Hindu law and the other on the Muslim law, projected by Warren Hastings were carried out under his immediate patronage and, in the end, derived their existence through

his continuous support. These two works represent the earliest attempts on the part of the Englishmen to ascertain the principles of the two systems of personal laws, and thus constitute a standing monument to the benevolent support which Warren Hastings extended throughout his tenure to the cause of the personal laws. In course of time, Hastings's policy of preserving the indigenous Indian laws came to be increasingly appreciated. It came to be recognized that to ensure stability of the British Government in India, it was of fundamental importance that affections of the Natives be conciliated, and that nothing could be more effective from this point of view than a toleration in matters of religion and adoption of such original institutes of the country as did not clash with the laws and interests of the conquerors. It was pointed out that a similar policy led to the success of the Romans who not only allowed their foreign subjects the free exercise of their own religion-and administration of their own laws, but sometimes even naturalized such parts of the mythology of the conquered as were in any respect compatible with their own system. Such views were expressed by Jones, a Judge of the Supreme Court of Calcutta, who resided in India for five years and devoted himself to the study of the Indian laws and institutions and who was a very enthusiastic advocate of their preservation. In his words:

Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to ensure the Hindu and Musalman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would

have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed or them by a spirit of rigour and intolerance.

As a result of these sentiments, the project of preparing books in the English language on these laws was taken further in the years subsequent to Warren Hastings, The quality of the earlier works produced under the patron-age of Warren Hastings was not rated very high. These works suffered from many defects.[18] Apart from all other considerations, the extreme vagueness and uncertainty with which the principles of these laws were shrouded made the task of ascertaining these laws quite complicated. It was much more so in the case of Hindu Law which for all the duration of the Muslim rule in India was administered not through any formalized agencies, like the courts, but through *panchayats* and private arbitration. The law was, thus, more traditional rather than written except in a large number of religious books. On many points of law, these books contained inconsistent doctrines. This difficulty can be illustrated by reference to *D.D. Munnoolal v. Gopce Dutt,* a case decided by the Calcutta Supreme Court in 1786. The two Pandits attached to the court differed on the law point in dispute. The court then asked its interpreter to seek the opinion of the other Pandits. The matter was then referred to Justice Jones who was asked to put questions to the Pandits. He held a discussion with the Pandits, consulted original texts himself, and then

[18] According to Derrelt,' The order of appearance of the chapters (in the Halheid's Code), and the relative weight given to each does not correspond with anything known to the usual sastric works.... Unfortunately the order lacks logic as well as completeness and the general appearance, though neatly digested for a Sanskrit legal work, is repellent to a lawyer trained in the common law." *Ibid,* 241.

only could the court come to a conclusion as to the law applicable to the case.[19] At times, the Supreme Court sought the opinions of the Sadar Diwani Adalat on problems of personal laws.[20] The extreme uncertainty and the amorphousness of the personal laws, and the difficulties which attended the administration of justice according to (hem are fully explained in the following extract from a minute recorded by Governor Elphinstone in July, 1823 with reference to Hindu law:

The Dharam Shaster, it is understood, is a collection of ancient treatises neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge of perhaps the most learned Pundits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, Tounded indeed on the Dhurm Shaster, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text. The uncertainty of all decisions obtained from such sources must be obvious, especially when required for the guidance of a foreign judge, himself a stranger both to the written law, and to the usage which in cases supplies its place. The usual resource, when the Shaster has to be consulted, is lo refer to the Pandit of the court, on whose integrity the justice of the decision must in the first instance depend. Supposing, however, that he is honest and learned (which last quality is not now common, and must daily become rare), he has the choice of a variety of books to quote from, and in many instances the same books has a variety of decisions ort the same question. When the question depends on customs the evil

[19] Ind. Dec. (O.S.) I, 174.
[20] Doe. Dem, Juggomohun Roya v. Streemutty Neemoo Dossee, Ind. Dec. (O.S.) I, 358

is at least as great. The law is then to be collected from the examination of private individuals; the looseness of tradition must lead to contrary opinions; and even when any rule is established, it is likely to be too vague to be easily applied to the casein point. Add to this the chance of corruption, faction, favour and other sources of partiality among witnesses.[21]

Even as late as 1878, Mayne could say as regards the administration of Hindu Law: "The great difficulty which meets a judge is to choose between the conflicting texts which can be presented to him on almost every question." Thus, a great need was being felt to ascertain the principles of two systems of personal laws. In 1788, Justice Jones of the Calcutta Supreme Court, a great linguist who had an intimate knowledge of thirteen, and a fair knowledge of twenty eight, languages, proposed to Cornwallis that he might be provided with financial assistance to prepare the codes of the personal laws. His proposal was to prepare "complete digests of Hindu and Mohammedan laws, after the model of Justinian's inestimable *Pandects,* compiled by most learned of the native lawyers, with an accurate verbal translation of it into English, and if the copies of the-work were deposited in the proper offices of the Sadar Diwani Adalat and of the Supreme Court, and that they might be occasionally consulted as a standard of justice, we should rarely be at a loss for principles at least, and the rules of law applicable to the cases before us, when their imposition might so easily be detected.' The Government agreed to provide necessary funds to Jones and the work was accordingly undertaken. In 1972, he published his translations of the Mohammedan Law of Succession. *'Al Sirajiyah"*

[21] Life of Mountstuart Elphinstone, II. 112-115, Elphinstone's Minute, July, 1823

on Inheritance was selected for this purpose for it was regarded as an authoritative work in all Mohammedan countries which followed this system of Abu Hanifa. Jones also published his Institutes of the Hindu Law, or the Ordinances of Manu, early in 1794. In the meantime, a digest of the Hindu Law was in the course of preparation. Jones could not see the completion of this work as he died early. The Digest of the Hindu law projected by him was ultimately prepared after his death by Pandit Jagannath which was later translated into English by Colebrooke.[22] Governor Elphinstone of Bombay also planned "to compile a complete and consistent code from the mass of written law and fragments of tradition, determining on general principles of jurisprudence on those points were the Hindu books and traditions present only conflicting authorities, and perhaps supplying on similar principles any glaring deficiencies that may remain when the matter for compilation has been exhausted." What he wanted was to prepare a code of Hindu civil law, based partly upon the written books and partly upon the existing customs which should be administered generally by the English courts. The first step, according to Elphinstone, to accomplish such an objective "appears to be to ascertain in each district whether there is any book of acknowledged authority, either for the whole or any branch of the law. The next is to ascertain what exceptions there are to the written authorities and what customs and conditions exist independent of them." He suggested that the best modes to conduct these inquiries would be, first, to examine the Shastras, heads of castes, and other persons likely to be acquainted either with the law, the customs of castes, or the public opinion regarding the authority attached to each; and, second, to extract from

[22] For further details see Derrett, op.cit., 245-50

the records of the courts of justice the information already obtained on these subjects in the course of judicial investigation. Elphinstone's project could not be accomplished. The only immediate results were however compilation of a work by Steele, a young civil servant, which was characterized as "very comprehensive in its treatment of the whole subject, as it not merely gives an account of the legal treatises in the original Sanskrit which were held in repute, but a mass of information regarding rules of caste, marriage, inheritance, and the customary law in some branches of contract, gathered by inquiries through various channels, official and private." This work was followed by a series of reports of the decisions of the courts of law, prepared by Borradaile, another civil servant, and by a translation by him of a Sanskrit book on inheritance. These different works, however, appeared only after Elphinstone had left India.[23]

These were some of the initial attempts made by the Englishmen to ascertain and define the principles of Hindu and Muslim laws. These works were not by any means clear, uniform or of a very high quality. Halheid's Gentoo Code has been declared to be of "no value", while Jagannath's work, translated by Colebrooke has been held to be of "great value." Colebrooke was a great Sanskrit scholar and Jagannath was one of the most learned Pandits that Bengal had ever produced and whose authority on questions of Hindu law ranks only next to *Jimutvahana.*[24] The work of ascertaining the laws was continued in Jater years as well by many scholars and some of the later works which were thus produced were of a very high merit. Sir Francis Macnaghten, a Judge of the Calcutta Supreme Court, published *his Considerations*

[23] Cotton, *Elphistone*, 178-84 (1896)
[24] *Kerry Kolitani v. Moniram Kolita*, 13 B.L.R. 1, 49.

upon Hindu law in 1824. A more valuable work was published by Sir Thomas Strange, the Chief Justice of the Madras Supreme Court, in 1825. By far the most important authority amongst the Hindu Law books by European authors was Sir William Hay Macnaghten's *Principles and Precedents of Hindu Law* published in 1829. Mayne's *Treatise on Hindu Law and Usage* published in 1878 has become almost a classic on Hindu law and has practically superseded all the earlier works. Similarly, in the area of Muslim law were printed several works by European scholars of which two are worth mentioning here: Sir William Hay Macnaghten's *Principles and Precedents of Muhammedan Law* published in 1825, and Mr. Neil Baillie's *Treatise of the Law of Inheritance* which is described as excellent.[25] Some Hindu and Muslim scholars also expounded the principles of these legal systems in learned works.[26] Thus were brought to light the principles of these laws in an organized and systematized manner. These works also played a very important role in dispelling many misapprehensions which had been previously entertained about the intrinsic worth and merit of the personal laws. The preparation of the works as mentioned here was the second best alternative to adopt in the absence of codification of these laws through the process of legislation which stage was to come only after a lapse of considerable time.

The Hindu jurists always accorded a place of great importance to custom as a source of law.[27] It was regarded as coming after *Sruti* and *Smriti*.[28] The process of integrating custom with ths law was, however,

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[25] Morley's Digest, I, ccxciv.

[26] As for instance, Banerjee, The Hindu Law of Marriage & Stridhana (1878); Sarvadhikari, Hindu Law of Inheritance (1882).

[27] See M.P. Jain, Custom as a Source of Law in India, 3 Jaipur L.J., 96 (1963).

[28] While the ancient Hindu law givers like Manu and Gautam gave custom a low priority, Narada declared : custom is decisive and overrules sacred law." By the time *Mitak shara* and *Dayabhaga*

continuously carried on in ancient society and thus was born the various *Dharmasastras.* When the *Smritis* fell out of date in relation to the needs of the contemporary society, the commenter's adapted the *Smriti-law,* by the process of interpretation, to bring it in accord with customs which had taken roots in the then society. What the commentators did was to take up an old text of the *Dharmasastra* and interpret it in such a manner as lo bring it in harmony with the social *mores* and customs of the people. This process has been recognized by the Privy Council in the following words: "The Digest *[Mitakshara]* subordinates in more than one place the language of texts to custom and approved usage.[29] According to Derrett, "The *Smiritis* had been enlivened by commentators who introduced customary elements into their exposition."[30] It is how, starting from the same base, two major Schools, *Mitakshara* and *Dayabhaga,* grew in the country and the *Mitakshara* even came to have four sub-schools, *viz., Dravida, Miihila, Bombay* and *Banaras.* On the other hand, the attitude of the Muslim jurists to custom was somewhat different from that of the Hindu jurists. The sources of Muslim law are *Koran* as containing the word of God; *hadis* or traditions being the inspired utterances of the Prophet and precedents derived from his acts; *ijma,* the consensus of opinion among the learned; *urf or* custom and *kiyas,* the analogical deductions from the first three. *Urf* or custom thus assumes a somewhat subordinate position in the scheme of Muslim law.[31]

During the British administration, the question of the place of custom in the personal laws of the Hindus and the Muslims assumed a great

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schools were established, the supremacy of custom was also established.

[29] *Bhyah Ram Singh v. Bhyafi Ugur Singh,* 13 M.I.A. 373, 390.

[30] Administration of Hindu Law, op. cit., 40.

[31] Tahir Mahmood, Customs as Source of Law in Islam, 7 *J. I.L. I.,* 102-6.

significance. In this respect, a distinction may be drawn between the Presidency towns, on the one hand, and the mofussil on the other. The Act of Settlement, 1781, provided for the application of the 'laws and usages' of the Hindus and the Muslims to matters of inheritance and contract.[32] Thus 'usages' were specifically recognized, the question was authoritatively decided in *Hirabae v. Sonabae* by the Supreme Court of Bombay,[33] where a similar provision operated.[34] The question for the consideration of the court was whether Khojas and Cutchi Memons, who were Muslims by religion but who followed the Hindu customs of inheritance, should be governed by their customs or by the orthodox Muslim law. The court refused to accept the thesis that this provision meant the application of the *Koran* only, and that it excluded customs set up in conflict with the text of the *Koran* as regards the Muslims. The court held that the provision was framed solely on political grounds, and without any reference to orthodoxy, or the purity of any particular religious belief. The purpose of the provision was to retain the laws and usages of the Hindus and the Muslims. The policy which led to the making of the provision proceeded upon the broad and easily recognizable basis of allowing the newly-conquered people to retain their domestic usages. The provision did not, therefore, adopt the text of *Koran* as law any further than it had been adopted in the laws and usages of the Mohammedans, and any class of Mohammedan dissenters found to be in possession of any usage which was otherwise valid as a legal custom, and did not conflict with any express law of the English Government, would be entitled to the protection of the provision to the same extent as the most orthodox

[32] Supra 78
[33] Ind. Dec. (O.S.), IN, 100, 112.
[34] Supra, 111.

Sunni. It was thus clearly established that in the Presidency towns, a custom would be applied even though at variance with a religious text.

The position in the mofussil was somewhat different. Neither the rule of 1772, nor that of 1793, referred to custom as a source of law. It was only in Bombay in 1827 through S. 26 of Regulation IV, that custom was given a preferential place to the law of the defendant. Thus, there was doubt whether a custom in conflict with the written text of law would be followed or not. Perhaps, in the beginning the tendency was to ignore custom and apply the law of the books rather rigidly. This was mostly because the early British administrators were ignorant that custom played a momentous role in the lives of the people, and they wrongly supposed that the Hindus and Muslims were governed only by their sacred religious textual law.[35] It has been asserted by some that the insistence of the courts that the advice must be based on the original sources and commentaries, led to the application of rules which were either obsolete or which had never been observed. In the case of Hindu law, more specifically, it has been stated that to take the law from the Pandit meant the elimination from the court's horizon of much of the customs and usages which in the past had kept the law growing. But, this was not all, and the fact remains that "the British judges themselves were more royalist than the King in their devotion to Sanskritic learning," and even when a Pandit attempted to counter a text with the customary practice the judges would notice the variance and ascribe deviation from the text to the corruption of the Pandit and,

[35] Rudolph and Rudolph, Barristers and Brahmans in India: Legal Cultures and Social Change, VIII *Comparative Studies in Society and History* (Hague, 1965), 24-49; Venkataraman, Influence of Common Law and Equity on the Personal Laws of the Hindus in *Revisia Del fnslitutlo de Derecho Camparado,* 156 (1957). Also see. Rudolph and Rudolph, *The Modernity of Tradition: Political Development in India* (1967).

consequently, customary law was at a discount. The result of this approach was that at times some norms contained in the religious texts were applied which had become obsolete in practice, incourse of time. But then the realization dawned, and custom came to be accorded an important place in the scheme of things. As regards the Hindus, the position was settled rather early as the Privy Council, taking note of the great importance accorded to custom in the traditional Hindu Jurisprudence, ruled in 1868: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law."[36] The point was settled, still more specifically somewhat later when it was stated that where custom was proved to exist it would oust the general law, which, however, would regulate all outside the custom.[37] As regards the Muslims in the mofussil, the place of custom remained doubtful for some more time.[38] As late as 1904, the Allahabad High Court held in *Jammya v. Diwari*[39] that a family custom among the Muslims excluding the daughter .from inheritance could not be applied. This attitude of the courts was due to the low place allotted, to custom traditionally by the Muslim jurists.[40] But then the Privy Council conferred a favoured position on custom in *Mohd. Ismail* v. *Lola*

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[36] *Collector of Madura v. Mootloo Ramalinga, 12 Ml A.* 397, 436 (1868). At this lime, an interesting and scholarly controversy arose regarding the nature of Hindu law. Nelson, a Madras district judge, in a number of publications ranging from 1877 to 1887 denied that any such thing as Hindu law had ever existed. He also denied that Mitakshara was an authoritative \\prk on Hindu law. In a scholarly article, Mayne met these views of Nelson- He cited evid_ence and opinions of many scholars to show that Mitakshara was a work of great authority. He also stated that in the absence of a specific custom .Hindus were satisfied when Hindu law was administered to them and that even their customs were by and large in accord with the traditional Hindu view: Mayne, "Hindu Law in Madras."3 *L.Q.R.* 446 (1887); also, Preface to the First edition of Wayne's *Treatise on Hindu Law and Usage* (1878).

[37] *Neelkisto Deb v. Beerchunder*, 12 M.I.A. 523 (1869).

[38] In 1866, in Jawal Buksh v. Dharam Singh, (1866) 10 MIA 511, the Privy Council had left the question open whether a Muslim convert from Hindusism cold plead as a family custom, the Hindu customs of inheritance.

[39] (1901) ILR 23, All, 20

[40] In 1886, in *Surmust Khan v. Kadir Dad Khan*, IFB Rulings, NWP (1866), the same view was propounded.

Sheomukh[41] Custom now got precedence over, and was made legally enforceable even when in derogation to, the traditional and orthodox Muslim law. In *Md. Ibrahim* v. *Shaik Ibrahim,*[42] the Privy Council stated that in India "custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammedan Law, governing the succession in a particular community of Mohammedans.[43] But then the Shariat Act, 1937, abrogated custom to a large extent as regards the Muslims.[44]

Then there were certain territories in India, like Punjab, Oudh, Kumaon Hills, where the sacred books of the Hindus or the Muslims had not penetrated and had not bad much impact, and which were areas predominantly of customary law. In these areas, custom was specifically made the first rule of decision. It was only when no custom was proved that the personal law was applied.[45]

Thus, the courts gave the utmost scope to custom in administering justice to the Hindus and Muslims. All types of customs were applied, *e.g.,* tribal, communal, sectarian, local, family etc.[46] For example, the Supreme Court sustained a custom among the Jains under which a widow can adopt without the consent of her husband.[47] But while recognizing custom on one hand, the courts were, on the other hand, making it more formal or rigid. A custom to be enforceable, it was held, must be ancient, certain and reasonable. A general rule accepted

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[41] 17 CWN 97.
[42] AIR 1922 PC 59.
[43] Also, *Ali Asghar v. Collector, Bulandshahr* (1917) ILR 39 All. 574; *Roshan Ali Khan v. Chandhury Asghar Ali* (1929) 57 I.A. 29.
[44] Infra, 483
[45] *Abdul Hussain v. Sona Dero,* 45 I.A. 10 (1917)
[46] *Shiba Prasad Singh v. Prayag Kumari,* 59 I.A. 331 (1932)

was that a custom prevalent in 1773 or 1793 A.D. was ancient and enforceable.[48] These dates were selected because in 1773, the Supreme Court was established in Calcutta and in 1793, the Cornwallis scheme was introduced in the mofussil of Bengal, Bihar and Orissa and also a system of registration of Regulations was introduced at that time.[49] Thus, during the British Administration, custom came to be given a place of honour in the administration of justice. It became an important source of law and a large volume of case-law arose around the various customs. Custom was given preference over the religious law of the parties. This was a just and reasonable approach for, in practice, the law of the *Shastra* or the *Shara* was not observed by the people in all its pristine purity and all kinds of customs had ingrained themselves into the scheme of things. It was just and equitable that the law which the people observed in practice be enforced rather than the theoretical law contained in the religious books. It would have been harsh on the people to force them to forego their customs which constituted the living law in favour of the orthodox system of law. The courts adopted a kind of tolerant attitude towards the customary law of the people, and did not adopt a very scrutinizing attitude in the formative stages of the law in India with the result that most of the customary law of the people could be preserved. This was good in the days when the legislature was not active as a law-maker. It also came to be ruled that a custom against public policy, or against justice, equity and good conscience, or an immoral custom could not be enforced by the courts.[50] This led to the non-recognition of many customs. Thus, the

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[47] *Munalal v. Rajkumar*, AIR 1962 SC 1493
[48] *Ambalika Dasi v. Aparna Dasi*, 1918 ILR, 45 Cal. 835
[49] Supra, 147.
[50] *Fateli Alt Shah* v. *MuhammadBaksh*, A.I.R 1928 Cal. 216.

courts came to exercise a kind of censorial power on customs. But, it may be remembered that in course of time, proving a custom in court in derogation to *Shastric law* became an extremely onerous exercise, and thus many existing customs which could not be proved satisfactorily could not be judicially recognized. In course of time, proving a custom in the court in derogation to Shastric law became an extremely onerous and hazardous exercise, and thus many existing customs ceased to be recognized by the courts as they could not be proved satisfactorily. Before the advent of the British rule, customs were enshrined in the unexpressed" consciousness of the people and were enforced by village panchayats. They were unwritten and unrecorded. Till this happened, customary law retained elements of flexibility and growth. But the British courts began to insist on formal methods of proof. The onus to prove a custom was laid on the party asserting its existence by clear and unambiguous proof, by cogent and satisfactory evidence. There was no presumption that a custom existed. To facilitate proof of custom, records of customs came to be prepared in *wajib-ul-arz or riwazi-am* which could be received in evidence in the courts. Entries in these documents were held to constitute a *prima facie* evidence of customs but were not regarded as conclusive and could be rebutted by other reliable evidence.[51] In addition, some official and private attempts also came to be made to record customary law in some regions, and, thus, a few collections of customary law appeared during the British period.[52] Also, in course of time, new

[51] *Flalgobindv. BadriPrasad,* 50 T.A. 196 (1923). Difficulties in proving custom are very wsll illustrated by *Kochan Kant Kunuraman Kani* v. *Matheran Kani,* AIR 1971 SC 1398. The case originated in 'S56' and was finally decided by the Supreme Court in 1971. The Supreme Court agreed with the trial court as regards the non-existence of the custom asserted and overruled the High Court. So, to prove custom protracted legation may ensue at times. Also, *Sada Kaur* v. *Baktawar Singh,* A.I.R. 1970 Punj. 289.

[52] A few of the important collections are: Tupper, Punjab Customary Law (1881); Rattigart Digest

customs ceased to be recognized by the courts. The courts began to insist that only ancient customs could be recognized by them.[53] Custom then ceased to contribute much to the growth of law and the legal system tended to become rigid and fossilized.

It may, however, be noted that too much dependence on custom has its own disadvantages. Custom tends to make law very much less uniform as the law could vary from family to family, community to community and region to region in certain respects. Ascertainment of a custom places a heavy load on the judiciary for it must take evidence to find out what the custom is and whether it is ancient or not so as to be enforceable. With the development of society, with the increasing mobility of the people, with the maturity of the legal system, a time comes when uniformity of law becomes a great *desideratum.* So long as tribal sectarian or communal customs survive, the class distinctions among the people also continue. It is only through the evolution of uniform law that the Indian society may become more closely knit and integrated.

Modern legislation has abrogated custom to a large extent and the value of custom as a source of law has thus been reduced. For example, S.4(a) of the Hindu Marriage Act, 1955, gives overriding effect of the Act, and abrogates custom with respect to any matter for which the Act makes a provision, except for certain matters for which custom has been preserved. These matters are: recognition of marriage between parties within prohibited degrees and sapindas; rites and ceremonies

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of Punjab Customary Law (IRPO); Thurston, Castes ami Tribes of Southern India (1909); Risley, Tribes and Castes of Bengal (1891); Crooke, Tribes and Castes of the North-West Provinces and Oudh (1896). These collections made the proof of custom somewhat easy. For example, Rattigan's compilation's authoritative value has been recognised by the Supreme Court as being beyond controversy; *Jai Kaur* v. *Slier Singh,* A.I.R. I960S.C.1118.

regarding celebration of marriages; divorce. Thus a customary divorce is not abrogated.[54] The Hindu Adoptions Act, 1956, abrogates custom except on two matters: adoption of a married person, or of a person over 15 years of age. Similarly, the Hindu Succession Act, 1956, abrogates all custom.[55] This has introduced by and large uniformity and certainty in law.[56]

For Muslims, as early as 1937, the customary law was abrogated by the Muslim Shariat Law Act. This law vitally affected such communities as Khojas, Memons, Vohras, who were converts from Hinduism and continued to follow the Hindu customs in the matter of inheritance and succession. The Shariat Act abrogated these customs. Except three matters, viz., wills, adoption and legacies, where a Muslim can adopt Muslim law, in all other matters Muslim law was made obligatory for him. The reasons given to abrogate the customs among the Muslims were uncertainty, expense of ascertaining custom and inadequate rights granted to women under customary law as compared to Muslim law as such. The truth however is that the main agitation for abrogation of customs among the Muslims was carried on by orthodox Muslim religious bodies who did not relish that Muslims continue to follow customs having links with their previous Hindu culture.

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[53] *Mst. Subhani v. Nawab,* A.I.R, 1941 P.C. 21.

[54] In *Madho Prasad* v. *Shakuntala,* A.I.R. 1972 All. 119, a custom for divorce by mutual consent of the spouses was recognized by the court.

[55] *GurdialKaurv. Manga! Singh, A.I.R.* 1968 Punj. 396.

[56] There are still pockets of tribal areas where custom remains preponderant. Thus, under Art. 371A of *the* Constitution, Acts of Parliament are not to apply to the State of Nagaland affecting the religious or social practices of Nagas, their customary law and procedure etc. unless the State Assembly so decides by a resolution. Provisions for preservation of customary law in Meghalaya and Mizoram also exist. The social pattern of people in these areas is still tribal and they are not yet ready to give up their traditional values.

The Indian Constitution has also nullified some customs.[57]

2.8 HINDU LAW AND THE LEGISLATURE

During ancient times, the Hindu law had flexibility and an inherent capacity to grow. The methods usually employed for the purpose of growth of the law were the processes of interpretation and assimilation of customs. After the introduction of the British pattern of justice in India, these traditional instrumentalities of legal change and growth ceased to operate. New customs could not be recognized by the courts because of the theory that a custom could be enforceable only if it was ancient. The process of commenting, the powerful technique by which the Hindu jurists like *Vijnaneswara* and *Jimutvahana* shaped and moulded the ancient law to keep pace with the needs of the contemporary society, is simply not available to-day. A new interpretation of an old text would not be acceptable to the courts howsoever eminent the interpreter may be. The courts thus remain bound by the authority of the dead jurists. During the British period, the growth of Hindu law was arrested and Hindu law came to be fossilized.[58] Under these circumstances, the Hindu law is to develop, and develop it must in response to the changing pattern of life, then the only means of developing the law are either judicial interpretation or legislation. Judicial interpretation can merely be of limited efficacy as the courts are bound by authoritative works on law and the theory of precedent. When it is the question of reforming, modifying or abrogating well established principles of law in a modern society, the only way out is legislation.

[57] R.K. Tangkhnlv.R.S. Khultakpa, A.I.R. 1961 Man. i.
[58] Gajendragadkar, The Hindu Code Bill, 53 Bom. L.R. (1951).

The ancient system of Hindu law, contained in the *Smritis* and the *Commentaries,* was developed in the context of a social environment, economic condition, and a state of civilization which were radically different from those of the modern times. Some of the features of the traditional law are thus bound to be out of harmony with the contemporary social conditions and facts of life. Need has thus been felt to modify the law in certain respects so as to adapt it to meet the modern exigencies and circumstances. But in undertaking this task, the British administrators functioned under a self-imposed discipline and limitation. They hesitated to modify the persona] laws in consonance with the modern needs of the society because of the view that the personal laws were too much identified with religion. They were afraid that interference with their law might be regarded by the Indians as an interference with their religion and thus be resented by them. The British administrators were careful not to injure the religious susceptibilities of the Indians; they wanted to take the line of the least resistance and avoid all complications to the extent possible. This attitude was given expression to authoritatively by the Second Law Commission in its second report when it laid down that the personal laws ought not So be codified. The main reason advanced for this view was that the personal laws being religious in nature should not be interfered with by an outside agency.[59] Similar was the opinion of the Fourth Law Commission.[60] A number of other important Englishmen expressed the same view from time to time. For example, Morley said:

In considering the propriety of altering or abrogating the Hindu or Mohammedan laws, all pre-conceived notions of the relative

[59] Supra, 429
[60] Supra, 439.

excellence of the English and the native systems of jurisprudence should be taken as secondary considerations; nor should it be called in question whether such systems are in themselves good or bad; for it should never be forgotten, that, in the present state of society in India, they are undoubtedly the best adapted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of the faith of that people; and that, though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments.

In the same way,. Sir C.P. IJbert pointed out that one of the difficulties in codifying the personal laws of the Hindus and the Mohammedans arises "from the natural sensitiveness of Hindus and Mohammedans about legislative interference with matters closely touching their religious usages and observances." The apprehension of giving offence to the people made the Legislature during the British rule very chary of modifying the personal laws. Nevertheless, some changes had to be made in these systems by passing corrective and ameliorative legislation during the last hundred years or so, though generally, it may be said, that the Legislature moved mostly in response to strong public opinion in favour of the proposed changes and when the initiative for the reform came from the community concerned.

Taking a broad view of the legislative changes effected in the area of Hindu law during the British period, the first and foremost place may be accorded to that body of legislation which sought to improve the social status and the legal position of the Hindu women. The prejudices of some of the *Dharmashastra* writers along with the degenerate customs which arose in the Hindu society in course of time under the

impact of foreign domination, mainly the Muslim rule, were responsible for making the social position of Hindu women rather weak and inequitable. They came to occupy an inferior position in the eyes of law. This needed to be corrected and, therefore, the Legislature enacted a number of statutes designed to improve the lot of the women in the Hindu society. The custom of *Sati* was abolished in 1829.[61] The Caste Disabilities Removal Act, 1850, affected Hindu law.[62] The Hindu Widows' Remarriage Act, passed in 1856, was the first important measure in this series. The Act legalized the remarriage of the Hindu widows. It was an enabling Act and was passed at the instance of a reformist section of the Hindus. The next in the series was the Hindu Women's Rights to Property Act which was enacted in 1937. The Act conferred on the Hindu women better rights of property than they had possessed previously. It was by far the most important piece of legislation which effected revolutionary changes in the domain of the Hindu law of joint family, coparcenery, partition, inheritance, etc. The last statute in this series was the Hindu Married Women's Rights to Separate Residence and Maintenance Act enacted in 1946, The Act enabled a Hindu married woman, without dissolving the marriage, to claim separate residence and maintenance from her husband under certain circumstances mentioned in the Act.

A few statutes were enacted to suppress some objectionable social practices which had come to have the sanction of law and custom amongst the Hindus. The first step in this respect was the abolition of the inhuman practice of *sati* by Lord William Bentinck very early in

[61] The difficulties faced by the British administrators in reaching and implementing this decision are described in K. Ballhatchet, *Social Policy and Social Change in Western India*, 275-91; 298-305
[62] Supra, 423.

the day.[63] A very conspicuous evil which was sapping the very vitals of the society, was the practice of child marriage. To discourage this practice, the Child Marriage Restraint Act was enacted in 1929.

A few Acts were passed to relax the rigidity and rigours of the joint family system and to amend the law of inheritance. By the Hindu Gains of Learning Act, 1930, all acquisitions through learning, whether ordinary or specialized, whether imparted at the expense of joint family or of any member thereof, became the self-acquired and absolute property of the person acquiring the same. That the Hindu public opinion had undergone a great change can be seen from the fact that a less drastic Bill of similar nature passed by the Madras Legislature in 1901 had to be vetoed by the Governor of Madras in view of the intensity of public feeling against it. The Hindu Inheritance (Removal of Disabilities) Act, 1928, laid down that no person, except one who has been lunatic or idiot from birth, would be excluded from inheritance by reason only of his disease, deformity, physical or mental defect. The Act applies only to the *Mitakshara* School and not to the *Dayabhaga* School. The Hindu Law of Inheritance (Amendment) Act of 1929 altered the order of intestate succession under the *Milakshara* law with a view to prefer certain near cognates to agnates. Thus, son's daughter, daughter's daughter, sister and sister's son were declared to be entitled to succeed next after the paternal grandfather. This was the result of a realization that the *Sastric* law needed to be altered in order to bring the rules of inheritance in correlation with the dictates of natural love and affection. Reference may also be made in this connection to the Caste

[63] Supra, Chapter XV; also, note 1.

Disabilities Removal Act, 1850.[64]

Since independence, the Legislature has taken a more positive attitude in the matter of law reform and has undertaken to enact some of the measures which the British administrators were hesitant to undertake. The Hindu legal system was based on a rigid caste system. The caste system however broke down, and came to be regarded as an anachronism, in course of time, as a result of the release of new political and social forces. People began to think in terms of a classless and casteless society. As a consequence, many old principles of Hindu law perpetuating the caste system needed to be done away with. The Hindu Marriage Validity Act, 1949, constituted a great step in this direction; It came to validate inter-caste marriages. Before 1949, there was some confusion on the point and a few High Courts had declared such marriages void.[65] The Act of 1949 removed this confusion, declared such marriages as valid and thus sought to help in the consolidation and integration of the Hindu society. It was no doubt a step forward towards the evolution of a casteless society which is the great need of the day in India.

2.9 PERSONAL LAW OF MUSLIMS

1. Muslim Law System: The Mohammedan Law is founded upon revelations and blended or mixed with the Muslim religion. Its origin is 'Al-Quran' or the 'Quran' which is believed by the Mohammedans to have existed from eternity, subsisting in the very essence of God. The Prophet himself declared that it was revealed to

[64] Supra, 485, note 3.
[65] *Pudiava v. Pavanasa*, ILR 1922 Mad. 949; *Lakshmi v. Kalian Singh*, 2 Bom. L.R. 128; *Padam Kumari v. Suraj Kumari*, ILR 1906 All. 458; *Gopikrishna v. Mt. Jaggo*, 63, IA 295.

him by the angel 'Gabriel' in various portions, and at different times. Besides inculcating religion and theology, the 'Quran' contains also passages which are applicable to Jurisprudence, and form the principal basis of the 'Shara'. The entire system of Muslim law has actually been built up upon the two foundations—the 'Quran' and the 'traditions' (Sunnah and Ahadis). 'Quran' may be said to be the first and great legislative Code of Islam.

2. Development of Muslim Law: The development of Mohammadan law may be divided into four periods:

(a) The Period of *Quranic* precept: This period ranges from I to 10A. H. From the time of the memorable flight, which makes the commencement of the Hijra era, the Prophet had the full responsibilities of a temporal sovereign, first over the city of Madina and ultimately over nearly all Arabia. Most of the legal verses of the Quran were revealed during this period.

(b) The Period of *Sunnah*: This period begins from 10 A. H. and ends at 40 A. H. The two things are apparent in this period are the close adherence to ancient practice under the fiction, adherence to *Sunna* and secondly the collection and the editing of the text of the Quran.

(c) The Period of theoretical study and collection: This period ranges from 40 A. H. to 300 A. H. During this period in the region of the 'Ummayyadas' the full possibilities of the traditions as sources of law were begun to be realized. The work of collecting the traditions took place and the collections of Bukhari and Muslim, for instance, came to be recognized as authoritative.

(d) The Modern Period: This period ranges from 300 A.H. to the present day. After the four great Imams, namely, 'Abu Hanifa, Malik Ibn Anas, Ash Shafei and Ibn Hanbal' the modem learned doctors of Islamic law continued the process of interpretation. During this period there emerged two parallel doctrines namely the Mjtihad' and 'Taqlid'.

Having thus studied the Muslim legal system and its development in brief let us study its development in India under Muslim Rulers.

3. Muslim Law in India under Muslim Rulers: The particular forms of Islam faith and practice now prevalent in India are naturally those followed by the bulk of original immigrants. By the time of the Muslim Conquest of Hindustan was completed Hanbahism and Shafeism had ceased to count for much in the great law schools of Khurasan and Transoxiana, which would be the chief recruiting ground for the 'Ulama of Muslim India' The real struggle in those regions was thenceforth between the 'Hanafia' and 'Shias' and in this India was not uninterested. There is difference at this stage between the 'Shias' and 'Sunnis' which must be pointed out. The Shias recognize "Imams' as their heads in all matters both spiritual and secular. 'Mujtahlds' are also recognized to the present day. The Mughal Emperors were Hanafis. The Kazis appointed by them administered the Hanafi law. Thus Hanafi Law was, in the Mughal times, the law of the land. This continued till the establishment of the British rule.

4. Muslim Law under the Company

(a) Application of Muslim Law: The condition of the Mohammedan Law under the Company was exactly the same, as it was of

Hindu Law.[1] IQ the early days of British rule the influence of Islamic Law, pure and simple was felt everywhere. The Mohammedan Law was applied as a branch of personal law to those who belonged to the Muslim persuasion in accordance with the principles of their own school or sub-school. Rules of Warren Hastings and Impey as embodied in the Regulation of 1793 and provisions made in Act of 1781 saved personal law of Muslims certain matters.[8] In early British period Criminal Law was Muslim but it was successively modified and by 1862 it finally disappeared. Today Mohammedan Law applies to such topics as Inheritance, Succession, Waqfs, Preemption, gifts, Marriage, Parentage, Divorce, Guardianship and Maintenance.

Muslim jurists have criticized the judicial pronouncements from time to time. Fyze observed that: It is a matter of some interest, however, that in *Abdul Fata* v. *Russomoy,*[3] by holding that family Wakfs were void, their Lordships misunderstood an important point of the Mohammedan Law of Wakf, misapplied a rule of English Jaw to the Muslim institution of wakf, and overruled a long line of Muslim jurists, both modern like Mr. Justice Ameer Ali and ancient too numerous to mention. Poetic justice was, however done when they themselves were overruled by an Act of the Indian Legislature".[1]

Another jurist Rahim expresses his opinion as follows:

"If we analyze the rulings, the results may be thus summarized. In the domain of law governing domestic relation and succession the Courts have allowed themselves a much narrower margin of freedom if any freedom at all, in applying the rules laid down in books written by mediaeval writers to the altered circumstances of modern world then in

matters relating to dispositions of property, such as by gift, wakf or will."

(b) Works on Muslim Law: The same motives which led Warren Hastings to prepare a Code of Hindu Laws, induced him to have a translation of 'Hedaya' into English language. The Arabic version of this book was rendered into Persian, from which Hamilton prepared an English translation. Sir William Jones in 1792, published his English translation of the Mohammedan law of inheritance and the Mohammedan Law of Succession to the property of intestate. It was based on Sirajiyya and its English translation, known as Ai Sirajiya. This work was of great utility. In the words of Neil Baillie: The Sirajiyya is very brief and abstruse (hard to understand) and without the aid of a commentary, or a living teacher to unfold and illustrate its meaning, can with difficulty be underload even by Arabic scholars. It is therefore not a matter of surprise that its translation by Sir William Jones should be almost unknown to English lawyers, and be perhaps never referred to in His Majesty's Supreme Court of Judicature in India. With the assistance of the Sureefeea it is brought within the reach of most ordinary capacity; and if the abstract translation of that commentary for which we are also indebted to Sir William Jones ; had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of inheritance." In 1850 Mr. Neil Baillie further produced Mohammedan Law of Sale. Later on other works came into existence.

(c) Muslim Law Officers: To bring the rule of Hastings, reserving their personal law to Mohammedan, into action, the Mohammedan Law Officers were employed in the Courts of Law. Their function,

like Pandits, was to expound the law. The appointment of Maulvis as Law Officers was done with the same motives as it was done in the case of Hindus,[3] *viz.*, the English Judges were not conversant with the habits, manners and customs of Muslims, and they could not derive any help from the Law Books written in Persian or Arabic. However, this class of law officers was abolished by an Act XI of 1864. The reason for so doing were almost the same as they were in the case of Hindu Law Officers.

(d) Sects and Sub-sects: The Mohammedans are divided into various sects and sub-sects. The two major divisions are Shia and Sunni. It seems that the Mohammedan Law as a personal Saw was applied to them in accordance with the principles of their own school or sub-school.[1]

In *Rajah Deedar Husain v. Ranee Zuthoornissa* the Privy Council observed: 'According to the true construction of this Regulation, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mohammedan Law of Succession applicable to each sects ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mohammedans, but that the Mohammedan law, whatever it is, shall be adopted. If each state has its own rule according to the Mohammedan Law, that rule should be followed with respect of litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it has founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged.

2.10 MUSLIM LAW AND THE LEGISLATURE

The attitude of non-interference adopted by the British administrators in case of the Hindu law was reflected much more tenaciously in the case of the Muslim law. On the whole, changes made in the Hindu law were far greater than was the case m the domain of the Muslim law. Fewer changes were effected in the Muslim law than the case with respect to Hindu law. In fact some of the statutes were passed in order to restore the orthodox doctrine of Muslim law and to undo the effect of judicial decisions. This can be ascribed to conservative public opinion among the Muslims. The two Acts which affect the Muslims are Caste Disabilities Removal Act, 1850 and the Child Marriage Restraint Act, 1929.

The first legislative change was made in the Muslim law in 1913 when the Legislature enacted the Wakf Act. This was to undo the effect of the Privy Council ruling in the famous case *Adul Fata Mohamed Ishak* v. *Roosomoy Dhur Cliowdhary,*[66] in which it held that wakfs which were founded for 'aggrandizement' of family, or gifts or charity which were illusory, or wakfs which were merely nominal, were void. The Muslims regarded this judicial dictum as being inconsistent with the true view of the *Shariat.* The Wakf Act of 1913, therefore, sought to bring the law back to the Muslim *Shariat* law and restored to the Muslims the right to make valid wakfs in favour of the family.[67] The communities like Rhojas, Memons, Vohras had become converts from Hinduism to the Muslim religion. Even though they renounced the Hindu religion, they did not renounce the Hindu law completely and in

[66] Supra, 475
[67] See, Tahir Mahmood, Muslim Persona Law, 41-45 (1977)

the area of inheritance and succession, the Hindu law continued to be administered to them by the courts as a customary law.[68] The orthodox Muslim opinion did not relish this position. Therefore, in 1937, the Shariat Act was passed which abrogated these customs and brought these communities under the Muslim law. In effect, Section 2 of the Act abrogated custom. In all matters except agricultural land, the rule of decision among Muslims in family matters was to be the Personal Law (Shariat).[69] Charities, charitable institutions and religious and charitable endowments are excluded from the scope of this Act. These two Acts restored the Muslim traditional law to the Muslims. Another piece of legislation was enacted in 1939. The Dissolution of the Muslim Marriage Act gave to a Muslim wife the right of judicial separation from her husband which had been denied to her earlier, perhaps because the courts followed mainly the *Hanafi* School of interpretation of the Muslim law. This Act was based on Islamic law of the *Mallki* School. This is the only legislative measure which has introduced a substantive reform in the Muslim law over a long period of time.[70]

On the whole, the effect of some of these Acts was to make the law somewhat rigid and to do away with the liberal tendencies released by some judicial pronouncements. This does not, however, mean that the Muslim law does not need a number of adjustments and amendments to accord with modern needs. The old system was developed in an age when social environment was completely different from the modern Indian society. Some of the rules of the Muslim law appear to be quite

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[68] Supra, 481, 483

[69] Fyzee, *Outlines of Muhd. Law*

[70] For background information regarding the passage of this Act, see, Tahir Mahmood, Muslim Personal Law, 54-57

out of context with the contemporary notions of social norms, as for example, polygamy, *muta* marriage, law of divorce, etc. On many points, the law remains uncertain even today. To mention only a few points, in the spheres of wills and gifts, the Muslim law remains uncertain even after its exposition by the Privy Council in the famous case of *Amjad Khan v. Ashraf Khan* in 1929.[71] Widow's right of retention over her dower property is also uncertain to some extent. Then, it appears to be an anachronism that while the Hindu law is being shaped according to new ideas, the Muslim law should remain static and be unresponsive to those very forces. For these considerations, it appears to be necessary and desirable that a number of legislative changes ought to be made in this law, but the lack of public demand in this respect remains a stumbling block in the way of doing what considerations of social good otherwise dictate. The Government of India remains chary of making a move *sun motu* to modify the Muslim law until there arises, a strong public opinion amongst the Muslims themselves to support it.[72] The truth also remains that many Muslim countries have modified Muslim law in many significant particulars.[73] As a reviewer suggests, Muslim countries with modernist orientation have modified Muslim law and he underlines three aspects of these reforms: (1) blending traditional law with Western ideas; (2) selection of principles and opinions from various schools of Islamic law; (3) interpretation of the Quranic text to suit contemporary thought. On the other hand, the Muslim or the orthodox opinion in India shuns any act of reform in the law and do

[71] 56 I.A. 213
[72] I.L.I. Proceedings of the Seminar on Reform of Muslim Law (1972)
[73] See, *Tahir Mahmood, Family Law Reform in the Muslim World* (1972).

not accept that it is out-dated with the contemporary realities of life.[74] Besides, on several questions of Muslim law, there exists a diversity of judicial opinion among the High Courts.[75] There exist gaps and uncertainty on several questions of Muslim law. The only way out is either an authoritative pronouncement on those points by the Supreme Court as and when an opportunity arises before the court for the purpose or legislation to clarify the law. The reform of any law through judicial process is slow and it has its own defects and limits. To effect quick and symmetrical changes, legislation has to be resorted to.

2.11 CODIFICATION OF HINDU LAW

During the British rule in India, except towards its close, no attempt was made to codify the personal laws.[76] As had been noted above, the British felt hesitant to interfere with the customs and religious-cum-legal principles applicable to the Hindus and the Muslims. This attitude was borne out of their desire not to interfere with the religious susceptibilities of the Indians. The First Law Commission had however expressed a desire to prepare a code of the personal laws[77] but, thereafter, it became an accepted tenet of the British policy not to interfere with these systems, to leave them severely alone and to modify them only to the extent there was demand for the same backed by a strong public opinion. The Second Law Commission expressly gave vent to this policy[78] and the same was repeated by the Fourth Law

[74] Jaffar Imam, Legal Modernism in Islam, 7 JILI
[75] See Survey of Muslim Law in ILI, Annual Survey of Indian Law, for conflict of judicial opinion.
[76] See Derrett, The Codificatioin of Pesonal Law in India: Hindu Law, 6 Indian Y.B. of Int. Affairs, 189 (1957); Gajendragadkar, note 1 at 484, supra.
[77] Supra, 418.
[78] Supra, 429.

Commission.[79] Another factor militating against codification was that these systems were still in the process of evolution; their principles had not become fixed; the systems were far too much flexible and time was not ripe to undertake their codification. Typifying this attitude is the following observation of Mayne as regards the Hindu law as it stood in 1878: "The age of miracles has passed and I hardly expect to see a Code of Hindu law which will satisfy the trader and the agriculturist, the Punjabi and the Bengali, the Pandits of Banaras and Ramaiswaram of Amritsar and of Poona. But I can easily imagine a very beautiful and specious code, which would produce much more dissatisfaction and expense than the law as at present administered." Here Mayne was dilating upon the lack of uniformity in the Hindu law as it operated in the various parts of the country, arising out of the various schools and sub-schools of Hindu law as well as the variable customs. It was a right policy not to make an early attempt to codify the personal laws because these systems were in an evolutionary stage and gradually the courts were ascertaining and declaring the principles of these systems applicable to varied facts of life. The growth of Hindu law was very fast as would be evident if one were to look through the various editions of Mayne's Hindu law. During the period 1878 to 1938, there were ten editions of this treatise, and between one edition and another, so many important decisions were rendered by the courts, and so many new points settled, that each subsequent edition needed a lot of rewriting. Case-law multiplied very fast and important decisions on several branches of Hindu law came in quick succession. To a limited extent, the same was true of the Muslim law as well.

[79] Supra, 439.

In 1937, the all important Hindu Women's Rights to Property Act was enacted. It struck at the roots of the *Mitakshara* system of joint family. It presented "in the compass of two sections the concentrated drawbacks of uncoordinated piece-meal legislation." The Act created a number of difficulties and presented a number of problems for, unfortunately, 'its impact on the Hindu law in its entirety was not visualized by the legislature. Pleading for the codification of Hindu law in 1938, the Editor of the tenth edition of the Mayne's Hindu Law, S. Srinivasa lyengar, said:

> *But it is obvious that the age of the legislator has come.. , While many parts of Hindu law require reform and legislation may be welcome, it is essential that Hindu law should be in a form readily accessible to the Indian ministers, politicians, legislators, the Press and the Public. A codification of the Hindu law of property and succession is very desirable. In future, the legislatures will be frequently called upon to consider measures of reform. And any legislation will be most unsatisfactory if reform is undertaken at one point without envisaging its consequences throughout the whole field of Hindu law. The time has certainly come to cheapen the ascertainment of law, to make it, if only in its broad outline, a common possession of all literate citizens and to minimize the inconveniences and complications of a personal law, intermixed as it is with local or family customs which have long outlived the needs of an earlier day, by the enactment of a code of Hindu law applicable to the whole of Hindu India which is governed by the two Schools.*

"With the emergence of such sentiments amongst the educated Hindus, it became desirable for the Government of India to take steps towards the codification of the Hindu law. Consequently, the Government appointed a Hindu Law Committee to prepare the draft of a Hindu Code. The Committee submitted its report on February 21, 1947,

advocating codification of the Hindu law, and presenting a draft code. The Committee adduced a number of reasons for favouring codification of Hindu Law. First and foremost was that it would instill certainty and simplicity into the system of Hindu law as administered in India. Generally speaking, a virtue of codifying any branch of Jaw is to bring forth certainty and simplicity by enunciating legal propositions in short and simple sentences. The principles of Hindu law at the time lay buried in a multitude of cases of a number of courts. On some points, the High Courts had rendered conflicting opinions. On some points, even the Privy Council had changed its opinions from time to time. It was quite a difficult task to ascertain legal principles from the mass of undigested case law. Codification was bound to solve these difficulties. It would help in dispensing with a vast amount of legal literature. Law would become certain and better known which would tend to avoid long and costly litigation. Another advantage which could accrue from codification was that uniformity could be introduced into the Hindu law throughout the country. Hindu law at the time was divided into two main schools and a number of sub-schools. Although there was a considerable measure of uniformity amongst the various schools, yet there were differences also some minor, some major, amongst them. It was thought that it would really be a great achievement if Hindu law could be unified and a code produced which might apply uniformly to all Hindus throughout the country. On points of difference amongst the schools and sub-schools, the best course would be to adopt that view which appeared to be the most liberal and best suited to contemporary social needs. Lastly, there was the reformative aspect, Hindu law is a very old, ancient, legal system. According to Mayne, it has "the oldest pedigree of any known system

of jurisprudence.[80] It is expounded in a vast mass of literature produced at different periods of time, at different places within the country and by different persons. A study of this literature will reveal the basic truth that as a system of law it has never remained static that it has always grown. Unfortunately, due to foreign domination, first of the Muslims and then of the British, its inherent capacity to grow was arrested- The old instrumentalities of growth, the process of interpretation and assimilation of customs with the traditional written text, were not available with the introduction of the British system of justice.[81] The Hindu society was undergoing a change; new ideas new values of life, new modes of living continually affected the society and imparted to it a new tinge and changed outlook, IQ the absence of the law keeping pace with the change, a gap, a dichotomy, had arisen between law and society. Hence the need to modify the law so that it might satisfy the legitimate wants aspirations and needs of the people. This could be done only through legislation. During the past years, some changes had been introduced here and there in the system which affected the orthodox system in many vital respects, for example, the Hindu Women's Rights to Property Act is said to have struck at the roots of the Hindu joint family system. But these changes were sporadic, piece-meal and unplanned and were undertaken to meet a need here and a demand there without much of a system. What impact would a change in the law at one place have on the rest of the law had not been carefully analyzed. The result of uncoordinated, piece-meal legislation was to give rise to many unforeseen difficulties. The Hindu law being an integrated mass, a change at one place had its inevitable

[80] Hindu Law and Usage, Preface to the First Edition.
[81] Supra, 473.

repercussions at various other places. If this was not foreseen and taken care of, it resulted in creating confusion, complexity and vagueness in the law. The only way, therefore, was to take the law in one piece and introduce reform in all those places where reform was desired all at once so that an integrated and coordinated body of law could emerge. This could be done only through the process of codification. Consequently, the Hindu Law Committee prepared a draft Hindu Code after taking evidence from lawyers, bar associations and other bodies and private individuals. The draft code was Introduced in the form of a Bill in the Legislative Assembly by the then Law Member in I 947 and was referred to a Select Committee which presented its report in August, 1948. The Legislative Assembly then again took into consideration the report of the Select Committee. All through this period, right from the day of the appointment of the committee to prepare a draft of a Hindu Code till the time the Assembly took into consideration the Select Committee report, orthodox sections of the Hindu society opposed the passage of the code. Even President Rajendra Prasad was opposed to its enactment.[82] As a result, the Assembly did not proceed with the passage of the code. Instead, the code was broken up into separate parts dealing with separate matters and separate Acts were thus enacted. Thus, the Hindu Marriage Act was enacted in 1955; it was followed by the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956. These Acts have given a uniform law to large sections of the Indian people as they apply to Jains, Sikhs, Budhists and Hindus of all denominations and castes. The Hindu Succession Act does however maintain distinction between

[82] Setalvad

Mitak-shara and *Dayabhaga* Schools. The most complicated area, viz., of the Joint Hindu Family, has been left untouched and for the present there is no move to codify this branch of the law. It is in this area that the two Schools of Hindu Law, *Milakshai-a* and *Dayabhaga,* differ fundamentally. The effect of the modern Hindu legislation has been to secularize the Hindu law, to make it certain and uniform, and to reform the law so as to bring it into conformity with the facts of modern life. For example, in the area of marriage, monogamy and divorce have been introduced. Both of these are fundamental departures from the traditional Hindu law. Such Western concepts as judicial separation, cruelty, desertion, nullity of marriage have been introduced into the marriage law with the result that courts freely cite English cases to expound the meaning of these concepts and law has become Anglo-Hindu law. Thus, in *Priti Parihar* v. *Kailash Singh*[83], the court has held on the basis of the English cases that mental cruelty is included within the concept of cruelty. These statutes have modernized Hindu law by eliminating the caste factor from the law and conferring equality. On the two sexes. In those areas, however, which have not been codified, the law remains uncertain. It may be hoped that sooner than later the whole of the Hindu law would be codified.

No steps have, however, been taken yet for codification of the Muslim law although its codification is desirable precisely for the same reasons for which codification of the Hindu law was suggested. The Muslim law as of to-day needs many changes; it represents an age long gone by and so it needs to be reconditioned to suit the

[83] AIR 1975 Raj. 7. Also, *Jai Lal Abrol v. Sarla Devi*, AIR 1978 J. & K. 69. For comments on this Act see, *Raj Kumari Agrawala. Matrimonial Remedies* (1974). Also, on modern Hindu Law, See, Hooker, *Legal Pluralism*, 58-85 (1975); Rene David & John Brierly, *Major Legal Systems in the World To-day*, 440 *et seq.* (1978)

contemporary societal needs. But as the public opinion amongst the Muslims favouring legal change is practically negligible. In todays' context, Government hesitates to undertake any step *suo motu*.

Chapter-3:
Empowerment of Women under Personal Laws in India

Chapter-3

EMPOWERMENT OF WOMEN UNDER PERSONAL LAWS IN INDIA

3.1 INTRODUCTORY REMARKS

Gender does not refer simply to the study of women. Rather it refers to the manner in which male and female differences are socially constructed. Invariably, culture plays an influential role in assigning gender roles. There was a time when rights and women were considered antonyms of each other and incapable of co-existence. A combination of the two was viewed as a mismatched amalgamation. Despite various religious injunctions and well defined legislations. The strong patriarchal traditions continue which view daughter as a liability, wife as an object of subordination, mother as an aide of family burdened with house maintenance and daughter in law as a typical housewife who is suppressed and shackled by the age old customs and traditions. Subjugation of women is deep rooted to such an extent that it goes largely unseen, unexamined and unquestioned. In this chapter an attempt is made to critically analyze the position of women under various personal laws.

3.2 WOMEN IN HINDU CULTURE

The construction of Indian women's identity is wholly defined by her relation to others. From late childhood itself there is a deliberate attempt to train and mould girls into 'good women' - docile, submissive and self-effacing. Marriage and removal from all childhood attachments confound the identity struggles of the adolescent girl. It is

only motherhood that confers status, respect and identity to a female. But these problems and pictures are more complex in Hindu culture. In the name of ' sanskaras', Hindu women are tied up with the bondage of superstitions, which they carry till their death. In the *Manu Smriti* the woman is born a sort of slave of her father when young, to her husband when she is middle aged and to her son when she is a mother.

The patriarchal Hindu structure is the product of this type of Gender formation, which resulted in over-emphasis on the male child, the preference for sons and neglect of daughters. Hindu Code Bill tries to change the laws of Manu, which were misogynistic and reduced a woman to a commodity. The Hindu Code Bill is a sense marks the end of the laws of Manu and brings forth a text that has possibilities for the liberation of women.[1]

Because of caste hierarchy and patriarchal structure women are second-class citizens in every day social life.

The legal position of women according to Manu, the earliest exponent of law was definitely unfortunate. They were always dependent on somebody either the father, or the husband, or the son. A woman is not entitled to be independence; her father protects her age in her maidenhood, her husband in her youth and her son in her old age. They were treated in law as chattels and a non-entity in the family. A wife, a son, and a slave these three even are ordained destitute of property whatever they acquire become his property whose they are. [2]

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[1] Pratima Pardeshi, The Hindu Code Bill for the Liberation of Women in Anupama Rao (Ed.) Gender & State, Kali for Women, Delhi , 2003, p. 346.

[2] Nandini Chavan & Qutub Jahan Kidwai, Personal Law Reforms & Gender Empowerment: A Debate on Uniform Civil Code, Hope India Publication 2006, p.59

According to the Manusmriti, women are not to be free under any circumstances. In the opinion of Manu:

- IX 2. Day and night women must be kept in dependence by the males (of) their (families), and if they attached them selves to sensual enjoyments, they must be kept under one's control.

- IX 3. Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age, a woman is never independent.

- IX 4. Considering that the highest duty of all castes, weak husbands (must) strive to guard their wives.

- IX 47. By a girl, by young women, or even by an aged one, nothing must be done independently, even in her own house. A woman does not have the right to divorce.

- IX 45. The husband is declared to be one with wife, which means that there could be no separation once a woman, is married.

  Manu does not prevent a man from giving up his wife. Indeed, he not only allows him to abandon his wife but he also permits him to sell her. But he prevents the wife becoming free. See this:

- IX 46. Neither by sale nor repudiation is a wife released from her husband. Manu reduced a wife to a level of slave in the matter of property'.

He says:

- IX 416. A wife, a son and a slave, these three are declared to have no property: the wealth, which they earn, is (acquired) for him to whom they belong. When she becomes a widow, Manu allows her maintenance. Manu never allows her to have any domination over property.

In the context of the Hindu Dharma (religion), caste hierarchy and patriarchal system dominated the Hindu society. This ultimately led to the subordination of the woman status.[3]

3.3 WOMEN'S RIGHTS AND CUSTOMARY LAWS

Custom was an important source of law. Its validity under *Smriti* law and its relevancy to castes and tribes, who were not governed by the Smriti law, is there.

Local customs were held in high esteem and were acknowledged as an important source of law under the Smritis. Gautama, Manu and Brihaspati granted special recognition to custom. The local customs varied from region to region. The Southern states granted women greater rights. Both Yajnavalkya, and Vijnaneshwar who had expanded the Kya, and Vijnaneshwar who had expanded the parameters of women's right to property, hail from the Southern (Dakshina) region. The Southern, and predominantly Dravidian regions, followed various pro-women practices of property inheritance even under *Smriti* law. The liberal construction of Stridhana under the Bombay and Madras schools is an indication of this. A custom of handing over a piece of

[3] Ibid, pp. 93-94.

land to the daughter at the time of her marriage prevailed within the Madras presidency.

A woman's right to one-third of the property upon her husband's remarriage was also recognized within certain lower castes of Madras Presidency and was termed as Patnib-hagam. In Andhra Pradesh there was a practice of giving land to the daughter at the time of her marriage, which is known as Katnam. In the Karnataka region Virasaiva women inherited twelve per cent property in the form of land from their mother and this property customarily passed on only to daughters, even when boys did not inherit from their fathers. The Buddhist literature also indicates that women could own property and gift property in their own right.

The Brahmanical-Aryan customs followed by the upper castes of North India exercised a strict control over women and their sexuality and the status of women among them was low as compared to women from the lower castes and the Dravidian regions. The *Shudras*, considered to be out of the caste system, were not governed by the code of *Smritis*.

Shudra women worked and contributed to the household and hence were not totally dependent upon their men. Most of the lower castes practiced the custom of bride price, where the father of the girl had to be compensated for the loss he suffered by the marriage of his daughter. Although the Smritis shunned this practice, as it amounted to sale of a daughter, the fact that it is mentioned in most Smritis and commentaries indicates its wide acceptance by the various castes including the Brahmans. It continued to be followed by several castes

in the southern region, northern Himalayan region, and various tribes' right up to the pre-independent India.

Marriages among the various lower castes were less sacramental and more contractual. In the Deccan region remarriages of women whose husbands had been absent for a long time was permitted. If the first husband eventually returned, the woman had a choice to live with either the first husband or the second husband but who was deserted had to be reimbursed his marriage expenses.

The custom of divorce and remarriage was also prevalent among Lingayats of Karnataka, Kapus of Telangana, Jats of Punjab and Haryana, certain castes among the Maravars, Namoshudras of Bengal and the Banias of Bihar. In the northern parts of Bihar, Orissa, Chhota Nagpur and Assam all castes and tribes permitted remarriage. It was also accepted as a universal custom in the Darjeeling and Manipur regions. As a community progressed economically, it took upon Brahmanical practices and exercised a stricter sexual control upon its women.

A casual glance at the customs of the lower castes is sufficient to indicate an absence of a strict sexual code and correspondingly wider scope for negotiating women's rights of divorce, remarriage, property ownership, etc. among them.[4]

3.4 POSITION OF WOMEN IN THE *VEDIC* SOCIETY

The analysis of women's status in Vedic period is necessary in view of the fact that it is in the Vedic period when, for the first time, women's

[4] Supra Note 2, p. 41.

role formation began. However, the whole discussion regarding women was, then, based on philosophy and spirituality. Women's socio-economic status was altogether ignored. This was the reason which necessitated gradual declined of women's role and status in society, till *Dharmashastra* period. Although there had been talks over issues like women property (*Stridhan*), Marriage (Vivah), adoption (Dattaka) but not to enhance the status of women. Women's issues centered on women's sexuality, glory of motherhood and idealistic image of women. Consequently, women found themselves under many restrictions and bindings, which did not allow them to have their identity and freedom. Factor of casteism and patriarchy added fuel in deteriorating women status in the society. Nevertheless, it cannot be said that women's position was similar in every section of society. As there had been some customary laws, which favored women as far as their rights are concerned, such as marriage and divorce. In the colonial period women's positions in general became more and more prisoned in the hands of cruel practices like child marriage, dowry, widowhood, etc. This undue situation demanded immediate attention. As a result, subsequently many reformers came in the Hindu society.[5]

The status of women in the Vedic society is a matter of some debate. While there had been a consistent tendency to idealize their position, it is likely that reality may have been more complex. That women played a certain part in the productive process is evident from the term duhitr, as well as from their involvement in activities such as weaving. Further there are references to women seers of Vedic hymns, which would indicate some access to ritual and spiritual traditions. Besides, certain

[5] Flacia Agnes, Women and Law in India, OUP, New Delhi 2005, pp. 18-22.

practices such as child marriage seem to have been organized *patrilineally* and while there were prayers for the birth of sons in particular and for praja or offspring in general there was none for the birth of a daughter. Further, most of the major *deities* in the early Vedic pantheon temple are male, which could possibly indicate male domination on the human plane as well. Moreover, while early Vedic society was by and large relatively undifferentiated, there are no indications to suggest that women could occupy the highest positions of authority and prestige those of priests or the raja. Thus, a certain degree of social stratification along gender lines is *discernible.*

Vedic women had neither property nor the right of inheritance and their status was on a level with that of the Shudra. But other evidence tends to show the opposite. The wife as a companion in conjugal life in Vedic society was not an unusual feature.

The basic social unit was probably the patriarchal family. The four-fold *Verna* system, on the other hand, was virtually absent. There are only fourteen references to Brahmans, nine to Kshatriyas and one to the *Shudra,* the last named being referred to only in the context of the *purushashukta hymn,* which occurs in the tenth *mandala* of the *Rigveda* which is commonly regarded as late.

There are four Vedas but comparatively, in the Rig Vedic period the women enjoyed a high position in society. Many women made a mark as renowned scholars and philosophers like *Visvavara, Ghosala* and *Apala. Saunaka* in *Brahmadevta* mentions 27 *Brahmavadinis,* great scholars who contributed *Shuktas* in the *Rigveda.* Women were

married at a mature age, participated in religious ceremonies and had freedom in the choice of husbands. Polygamy was rare.[6]

3.5. POSITION OF WOMEN IN THE *EPIC* PERIOD

The dawn of puranas witnessed a significant change in the role of Hindu women which was limited and restrained to the basic ends of human existence. The men wanted their dominance making their women folks subservient to them. Neither they were left with freedom of choice nor did they become only the means for Hindu men to attain their end. The women lost their past status and glory and subjugated to men's whims. The concept of dual existence and rhythm of cycle of birth and death and rebirth and theory of pinddan threw the Hindu women to a place of subservience. Whatever they received in the Vedic period, they began to lose in the Puranic period. They became dependent on men. The marriage lost its independent value. It failed to secure a firm grip in the changing events of Hindu life. Hindu women began to be confined to the kitchen and producing a son. The Daughters were un-welcomed. Freedom to Hindu women was not recognized. They were just physical machines of production of the Praja for the family. Where they failed their life became hell. Son became important to them because through son the Hindu began to find their salvation. The Hindu pantheon god became figurative than supernatural power in the mind of the Hindus and everything began to be understood in the light of attaining Moksha through son.

Marriage began to be treated as Sanskar and a religious act and obligatory to marry. The freedom to marry or not to marry was

[6] Supra Note 2, pp. 45-46

disallowed. The question of choice also lost its meaning because that period attached no significance to consent of the girl in a marriage. The martial life was tagged with religion and religion made her dependent. Marriage alone was her granted salvation. This virtually degraded the position of Hindu women in the Puranic era. Whatever independence she enjoyed in Vedic period she now began to lose. The concept of sonship was affiliated to the theory of pinddan and for offering the pind to the deceased the presence of the son was essential. Therefore, the women who could not beget a son for the husband suffered indignity and hollowness of her physical existence. One can then find a significant change in the attitude of the men towards women. The story of desertion, cruel treatment, hostile and callous attitude began to show the seeds on Hindu women.[7]

3.6 THE FAMILY AND FORMS OF MARRIAGE

In several regions apart from monogamous relationships, there were also more archaic forms of marriage to be found. The husband was the head of the family. Gradually certain changes came about in the position of women who eventually became fully dependent upon their sons and spouses. Marriage was turned into a sort of property deal. The man purchased his wife and she became his chattel. Source materials tell of wives being sold or lost in the course of gambling. The women's position was extremely hard one. In childhood, she was expected to be completely in the power of her father, during her youth in that of her husband in the old age in the power of her sons. This is how women were placed in *Dharmashashtra*. Wives have to be patient unto death and strictly observe their obligations. The *Dharmashashtra* demanded

[7] Supra Note 2, pp. 58-59.

of a wife to respect her husband as a god even if he possessed no virtues. Only husbands were able to divorce their spouses. A wife was unable to abandon her family. Even if her husband sold her or left her, she would still be regarded as his wife. An unfaithful wife would be subjected to most terrible punishments, including death. A man could have several wives and would not be considered sinful. A wife had to belong to the same Varna as her husband. Only in rare cases were women allowed to marry a man from the lower Varna. The most serious crime was held to be a marriage between a *Shudra* and a Brahman woman. A father's power over his children was decisive and final. [8]

3.7 RIGHTS OF WOMEN

The foremost rights of a wife and the corresponding obligation as a husband, is the provision for her support and maintenance. It has always been repugnant to Indian feeling that a husband should let himself be supported by his wife, as instanced by Sita's contemporary reference to actors living on the vice and earnings of their wives.

The *kanya-dhana* or bridal gifts offered by parents at their daughter's marriage became her *stridhana*. This property must have remained at the disposal of wife. Besides, kings occasionally transferred property and gifts on their wives who then acquired absolute rights over their use and disposal.

As far as conjugal right is concerned, it emphatically laid down that the husband, during the proper season must visit his wife and that it would be a sin for him not to fulfill her wishes then.

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[8] Supra Note 2, pp. 61-62.

The association of wife in the coronation rituals further establishes the status of equality accorded to her on some of the most essential ceremonies. A widow took part in the funeral ceremony of her husband. The wives of Vali are described as joining his funeral procession along with men. Women often led the way on such occasions. They also participated in offering water libations to their deceased relatives.

Normally husband and wife performed religious prayers and sacrifices jointly. If the husband's participation was not available for some reason or the other, his wife could perform the rites alone. In the absence of her husband she had the right of attending to the daily *agnihotra.* Worship of the gods and performance of *Sandhya* were not denied to women. *Kaushaluya* performed all alone the *svasti-yoga* ceremony to ensure felicity for her son evidently because *Dashrath* was engaged in assuaging *Kaikayi.* These instances show that a women's participation in sacrifices was real and that very often husbands used to leave the affair to the exclusive charge of their wives when busy otherwise.[9]

a) Property Rights of Women and Diversities in Hindu Law during *Dharamashastra* Period

In the early Hindu society, women had no legal status. The Hindu law of inheritance had deprived women of the right to property (except the right to their Stridhana). As a result, their economic security was completely dependent on the pleasure of the man—husband, father, and brother.

[9] Supra Note 2, p. 60.

Every member of the coparcenary has a right by birth in the property of the coparcenary. This right is not determined until partition is made; it is liable to fluctuations; it increases with every death in the family and decreases with every birth. The persons constituting the coparcenary own the property of the family as a joint tenant with the right of survivorship and they leave the management of the family and its properties in the hands of the manager, who is clothed with some special powers. But even these special powers do not justify the alienation by the manager of the property of the family unless the transaction is supported by legal necessity. On the other hand, under the Dayabhaga system of Hindu law coparcenary is unknown. The father is the absolute owner of the property so long as he is alive; his sons can claim no share in this property by their birth and on his death his property devolves by succession amongst his heirs, each one of whom takes his share as his separate and absolute property and all of whom together own the property not as joint tenants, but as tenants in common.

Yagnavalkya states that the father is master of the gems, r-earls and corals and of all other movable property; but neither the father nor the grandfather is so of the whole immovable property. Then he refers to the Manu's texts in which Manu says, "the support of persons who should be main-timed is the approved means of attaining heaven; but hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them.[10]

[10] Gajendra Gadkas (P.B) (1951), Hindu Code Bill – Karnataka University Lectures, Karnataka University, Dharvad, pp. 35-36.

Jimutvahana states that in Bengal it was quite common for the father to sell ancestral immovable property without any objection, and he naturally wanted to bring that practice within the framework of Hindu law. In fact, this part of *Jimutvahana's* reasoning shows that he was attempting to adapt and adjust the principles of Hindu law to the changed and altered practices that had become popular in Bengal.

At a time when and in the territory where *Vijaneshwara* lived the popular usage and custom had clothed the sons with the right in the ancestral property by reason of their birth. There are texts, which support both the views of both *Mitak-shara* and *Jimutvahana.* The text of Devala unequivocally supports *Jimutvahana* because *Devala* says, "the father being dead, the sons should divide the father's wealth-since there cannot be ownership in them, while the father is living- being faultless. The text of Gautama says: "From the very moment of birth, one obtains the ownership of wealth-thus say the authorities". "The material text of Manu reads thus": After the father and the mother, the brothers having assembled together, should divide the paternal inheritance. Of the immovable property, and the slaves, although acquired by one's own self, there is neither a gift, nor a sale, without assembling of all the sons. Those who are born, those who are unborn, and those who are laying the womb, they wish for sustenance. There is neither a gift, nor a sale". He says the land apportioned by the grandfather, or corrody, or property, therein the ownership of both the father and the son, should be alike. *Jimutvahana* wanted to confine the absolute and unrestricted power of alienation of the father to his self-acquired property.

According to the authors, Dayabhaga and Mitakshara differ radically in their treatment of joint family property, each one of them propounds the thesis that his view is based upon ancient Hindu texts.[11]

b) Daughter's Property Rights

Two distinct tendencies are clearly discernible in the ancient Sanskrit literature dealing with this question. The protagonists of the view that the daughter must be excluded can take comfort from the thought that their view receives the support of a passage from the *Rigveda* itself. The famous 31st hymn in the third *Mandala* of the *Rigveda* as explained by the *Sayana* provides: "the son does not vacate the inherited wealth for his sister, he makes her the repository of the issue of him who takes her; although the parents procreate both the males and the females, the one is a worker of good deeds, the other is graceful. In ancient Vedic times where the strife and struggle were the order of the day, it is not surprising that the warrior should have monopolized succession to the estate and the female should have been treated as merely the repository of the issue of him who takes her.

Both Manu and *Yajnavalkya* do not seem to subscribe to this unqualified and absolute prohibition against the daughter's claims to succeed to a part of their father's estate. Manu in chapter IX, verse 130, says: Just as a person is born through his son, so is he through his daughter: the daughter and the son are equal. If the daughter is alive, how can anyone else take away the estate of the father? Verse 118 in the same chapter says: "To the maiden sisters let their brothers give portions out of their allotments respectively: to each one-fourth part of

[11] Supra Note 2, pp. 68

his appropriate share. Those who refuse to give shall be degraded." Yajnavalkya in chapter II, verse 127, says, "And sisters should be initiated into marriage giving them the fourth part of ones own share. It is somewhat surprising that though the Dayabhaga School is of later growth than the Mitakshara, the views of Dayabhaga on this question are more retrograde than those of Mitakshara. In commenting on verse 127 of Yajnavalkya Vijnaneswara noticed a contrary view and severely criticized it. "If it is said that here also, the speaking of the fourth share is not intentional, that the real intention is to declare the payment of only as much wealth as is required for the sacrament of marriage, this is not so. Because there is no authority for saying that both the Smritis (Manu and Yajnavalkya) have spoken of the fourth share to be given, without really meaning the same; and because we hear also of there being a sin in case of non-payment."

Therefore, after the death of the father, the unmarried daughter is entitled to get a share; before, however (i.e. before the father's death), whatsoever the father gives, she gets. Thus it becomes unobjectionable. Says Yajnavalkya, "Those not religiously initiated should be initiated by brothers previously; initiated and sisters also-giving however, one-fourth share from the self-appropriated share". He is speaking of the indispensableness of initiating the unmarried daughters; (which means marrying); not of their right. And when there is much wealth, wealth requisite for the marriage should be given; there is no invariable rule for one-fourth share. This is the conclusion.

As to the nature and extent of the rights of women over property obtained by them, the texts of Yajnavalkya and Vishnu, which recognize the rights of the widow, the daughter, the mother, and other

females as heirs, do not make any distinction between the character of the estate taken by them and that of the estate taken by the male heirs. The words used in reference to both the estates are the same, and reasonably construed they do not justify the distinction made by judicial decisions between the two estates. The same is the position with regard to the text of Manu, which says that the widow of childless man, keeping unsullied her husband's bed and preserving in religious observances shall present his funeral oblation and obtain his entire share. On the other hand both Katakana and Narada seems to negative the absolute estate of women. Katyayana says: "The childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, should enjoy with moderation the property until her death. After her the heirs should take it."

According to Mitakshara all kinds of property in the hands of a female, howsoever it might have been obtained by her, is her absolute property. The text of Yajnavalkya, on which Vijnanaeswara has built his theory, speaks in these terms: "Whatever is given by the father, the mother, the husband and the brother and whatever is obtained near the nuptial fire and at the marital procession and the rest is known as Stridhana." Vijnaneswara has interpreted the word 'adyani' as including all other kinds of property, which a woman may obtain. Vijnaneswara puts his thesis succinctly by emphasizing that the word stridhana is used in its literal sense and not in its technical sense. This interpretation of Vijnaneswara is consistent with his view that women are entitled to inherit. According to Dayabhaga the property inherited by a widow from her husband is not her absolute estate, and it must be conceded that the courts in India have in effect imposed the Dayabhaga view on

the followers of Mitakshara School. Even so, it is perfectly legitimate if the Hindu Code seeks to make women's property absolute, as Vijnaneswara did in his Mitakshara.

Regarding the daughter's property rights under the schools of Hindu law, which do not admit a daughter to share in the property of her father, it is well recognized that at a partition between the members of the joint family, provision has to be made for the maintenance and marriage expenses of the daughter.

Scholars are divided to the genesis of this right. One view is that the provisions for the maintenance and marriage expenses of the daughter have to be made because the father is liable to maintain all his children and he is bound to get his daughter married before she reaches the puberty. On the hand, this view is not accepted by a large number of scholars of Hindu law who think that the better reason for this rule is really the historical remnant of her larger right.

According to Justice Ramesam, under the early Hindu law the rights of both the sons and daughters were imperfect rights in the property, which could not be materialized by compelling partition against the wishes of the father. Gradually however the son's rights developed into a right to compel partition, whereas the daughter's right first became a right to compel partition against the brothers only and not against the father and later on degenerated into merely a right to maintenance and marriage expenses. In other words, a study of the w historical development of this branch of the Hindu law shows that it is wholly inaccurate to say that the daughters were always treated as being inferior to the sons in the Hindu law. It may be that for some centuries

past their rights had gradually decreased and now have crystallized into a claim merely for the maintenance and for marriage expenses. If the Hindu Code seeks to confer upon the daughter somewhat larger rights than she enjoys today, it can well be claimed that the Hindu code has in that behalf the authority of ancient Hindu texts. If out of two undivided brothers one dies leaving behind him his daughter, she would get no share under the orthodox J view of Hindu law but the daughter of the survivor would get the estate solely because her father was the last to die.[12]

3.8 SOCIAL AND LEGAL POSITION OF HINDU WOMEN IN COLONIAL PERIOD

The subjection of the Indian women in the pre-British period was rooted in the social and economic structure of the society of the period. Birth determined the status of an individual in that society. The disabilities of a woman arose from the fact that she was born a woman. This inferior status of woman in society was made sacrosanct by religious ordinances.

Women had to strive hard for their rights in different spheres of life. The hesitation of the British government and the reactionary resistance of the orthodox sections of the society had to be combated before legislation was enacted such as would increasingly make woman man's equal in matters of civic rights. Among the organizations, which worked for the social, political and educational advance of the Indian women, the All India Women's Conference stood in the forefront. Orthodox India and old social and psychological habits were arrayed

[12] Supra Note 10, pp. 37-45

against it. However, the movement scored important success, though slowly.

There were barbarous customs in the past as Sati and infanticide from which the Indian women suffered. The widow had to throw her living body on the pyre with the corpse of her husband when he died. Parents killed girl babies for the marriage of a girl was too expensive for poor parents. Even when the custom of Sati was abolished, widows were prohibited from remarrying. Infanticide was also subsequently declared a crime. Yet it continued at many places. Child marriage had been one of the principal evils from which the Indian women, more than even men, suffered. Owing to the efforts of Ishwar Chandra Vidyasagar, the Act of 1860 was passed raising the age of consent for married and unmarried I girls to ten. It was also due to the efforts of the same social re-I former that, in 1856, the remarriage of widows was legally permitted. However, it was only in 1929 that a decisively legal step was taken to strike a blow at the harmful custom of child marriage. The Child Marriage Restraint Act passed in that year raise the age of marriage age for girls to fourteen and I for boys to eighteen.[13]

In the past, religio-reform movements like Buddhism tried even partially to elevate the status of the Indian women but it was only during the British period that big movements were organized to destroy the social and legal injustices from which they suffered for centuries. The social reform movements, which arose out of the new conditions of social existence, set itself the task of removing the social and legal injustices and inequalities from which the Indian women suffered.

[13] A.R. Desai (1948) Social Background of Indian Nationalism, Popular Prakashan Mumbai, pp. 240-242., 274-276.

The call for comprehensive reforms was premised on recognition of the entrenched and formidable power of Indian patriarchy; only comprehensive legislation could tackle the tightly interlocking questions of monogamous marriage, divorce and inheritance. In late 1920's and 1930's the nationalist women's organizations failed to sustain pressure for changes, which would most certainly have divided the nationalist women's movement. The advocates could not successfully speak for Hindu women with much confidence and ease in the 19th century when women had little access to the public political space. A discourse of women's rights as opposed to a discourse of women's duties to home and nation was slowly, if hesitantly, being articulated. If the discourse on women's duties to the home and nation had provided the only acceptable, indeed legitimate, basis on which to demand reform, the ideology of equal rights was gaining ground.

Basing themselves on the Karachi Congress Resolution, which guaranteed sex-equality, the women's sub-committee called for a uniform civil code to replace the separate personal laws. The Deshmukh Bill put some pressure on the government and it appointed (1941) the B.N. Rau committee to enquire into the need for a Hindu Civil Code.

The B.N. Rau committee, which had no woman member, affirmed that the time had arrived for a uniform civil code, which guaranteed more equal rights to women in keeping with the modernizing trends in Indian society but "the main emphasis of the first HLC (Hindu Law Committee) report was to legitimize the project of reform by reference to ancient Hindu traditions". There was neither an attempt to rigorously read and cite the Smritis nor to revamp the traditional legalities to

make them consonant with modern judicial systems. The opponents and supporters of the codification bills framed their arguments in terms of scriptural validity. The debate of the pre-independence years continued the practice of scriptural referencing. At the same time, at no point did women themselves make similar use of the scriptures in their favor

The property rights of most Hindu women were governed by the Mitakshara and Dayabhaga systems of law. The Mitakshara system made the distinction between the two kinds of property, joint family property and separate property. The first included ancestral property (namely property inherited from up to three generations in the paternal line) as well as any property that had become part of the joint property. Only male members of the family, up to four generations, were coparceners of this property, a right to which they were entitled from birth. Despite strict observations on its alienation, especially when it was immovable property such as land, every coparcener had the right to demand partition, without affecting the right of the others to stay undivided. On the other hand, under Mitakshara law, a man had absolute right to sell his self-acquired property, and if he had no male heirs up to the fourth generation, he could treat his share of ancestral property.

In the case of Dayabhaga, man enjoyed absolute right over all property, whether ancestral or self-acquired, including the right to gift, sell or mortgage it. Unlike the Mitakshara system, which conferred coparcenary right at birth on sons, and where the interest in the property varied according to the number of survivors, the Dayabhaga system ensured no birthright, and defined a fixed and non-fluctuating share for each heir.

Women's rights were extremely restricted under both systems. While systems recognized the absolute control of a woman over her Stridhana, this recognition was more or less confined to movables, and there was considerable confusion, of a textual or a practical kind, about whether it could include immovable properties such as land. Under Mitakshara law women only had a right to maintenance as wives, widows, or unmarried daughters, while the expenses of a daughter's marriage also devolved upon the family. On the condition that she remained chaste, a widow could enjoy a limited (lifetime) interest in her husband's property but only in the absence of male heirs up to the fourth generation. This meant that the widow could not alienate the property except in dire times of necessity. The daughter figured as an heir only after the widowed mother was dead but she too enjoyed only a limited estate. The chances of a woman inheriting property under Dayabhaga were slightly better, since women inherited both ancestral and self-earned property, although here, too, widows and daughters followed male heirs up to the fourth generation.

The movement to strengthen her position in society began from the second half of the 19th century. The earliest attempts may be traced back to 1865. The Act X of 1865 was the first step towards conferring economic security upon Indian women. The Indian Succession Act 1865 (Act X of 1865) laid down that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done 'if not married to that person.' In 1923, the Married Women's Property Act of 1874 was amended by Act XIII of 1923 so as to bring Hindu women and others

within its jurisdiction. On 15 February 1923, the Select Committee's report on the Bill to amend further the Married Women's Property Act of 1874 was taken into consideration. The bill intended to provide a policy of insurance, which could be for the benefit of the wife, or the wife and the children of the insurer. The Bill was finally passed into law in March 1923.17

The year 1923 was indeed a landmark; this was the year when the Hindu woman's independent right to property was recognized for the first time, although to a limited extent. No doubt, Section 4 of the Widow Remarriage Act 1856 entitled the childless widow to a share of her husband's property; this right was very limited in scope. So the attempt made in 1923 may be regarded as the first move when women's economic rights began to be honoured.

The Married Women's Property Act of 1874 was further amended in 1927 by Act XVIII of that year. Its aim was to safeguard the interests of husbands—a part of limited their liability when his wife had obtained a probate or letter of administration and was a trustee, executive or administrative either before or after marriage.

Another effort to effect changes in the Hindu Miatkashara Law was made through the Hindu law of Inheritance (Removal of Disabilities) Act of 1928 and the Hindu law of Inheritance (Amendment) Act, which further extended the Act of 1850 and put women in the line of succession. Further advancing the claim of women to property was the Hindu Women's right to Property Act of 1937. This was by far the most important single piece of legislation, and was well known as the Deshmukh Act. The Deshmukh Bill, introduced shortly after Sharda's

Bill to grant Hindu widows a share in their husband's property had suffered a resounding defeat in 1932. In order to enhance its chances of being passed, it confined itself only to the Hindu widow's inheritance rights. The Bill, passed in 1937, did substantially improve the inheritance rights of Hindu widows and introduced as heirs a man's widowed daughter-in-law and widowed grand-daughter-in-law. Even so the more radical aspects of the Deshmukh Bill were not included, and daughters were completely excluded from its purview.

The piecemeal nature of the proposed legislation greatly disappointed members of the All India Women's Conference, who clearly recognized that the overwhelmingly male legislative assembly was unlikely to initiate the changes that would undermine their existing privileges and powers. Lakshmi Menon declared at the 1933 conference of the AIWC: "If we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu law. The members in the Legislative assembly who are men will not help us in bringing any drastic changes which will be of benefit to us".

It may therefore be clearly seen that the Hindu women enjoyed a position of eminence under the Shashtric law but slowly and gradually they started losing their rights at the hands of the strong patriarchy that started viewing women as an object of rights instead of being a subject of rights. This position continued until the enactment of the Hindu Code Bill that faced much resistance from the ruling class before it could be passed.

3.9 POSITION OF WOMEN UNDER ISLAMIC LAW

The debate on Islam and women's rights can be traced back to the time of its evolution. Prophet Mohammed was born in Mecca C. 570 CE when a variety of marriage and divorce practices, and matrilineal customs existed. The initial discourse on gender and women's rights in seventh-century Arabia, when Islam first appeared, continued ideas and traditions set in place by the preceding Judeo-Christian tradition. The veil, for example, which was part of the prevailing custom practiced by a certain class of women in the Christian Middle East and Palestine permeated emerging Muslim societies.[14]

Before the advent of Islam, the position of women in Arabia was not good. The Arabs never wanted to have a female child as the same was considered a burden and a liability. The Arab society was a tribal society, where one tribe always fought against the other. Women needed the males to defend themselves and were, therefore, a liability. They were merely a share in the inheritance and the booty. [15]

There is another aspect of the matter. A daughter on attaining puberty was required to be given away in marriage to someone. This was something disliked by the Arabs. They abhorred the very idea of being called a father-in-law. They thus considered daughters as a drain on their resources. They were required to spend a lot on their upbringing almost as much as they had to do in the case of boys and yet not getting anything in return. They thus found out a way out of this

[14] Seema Qazi, Muslim Women in India, Minority Rights Group International 1999, p .28.
[15] Justice Mohd. Shamim "Islam & Women (2007) 1 SCC J 13

impasse i.e. to bury a female child alive. The Holy Qur'an refers to this in the following verse:

"When if one of them received tidings of the birth of a female, his face remain darkened, he is wrathful inwardly.

He hideth himself, from the folk because the evil of that whereof he hath had tidings (asking himself) shall he keep it in contempt, or bury it beneath the dust. Very evil is their decision." (16:58-59)

As a corollary of the above, the Arabs wanted to get rid of their daughters as soon as possible and when a girl attained her 5th or 6th year, she was either buried alive or hurled down from a hilltop.

There was yet another reason for doing away with females. It was poverty. Arabia is a desert and it was hard to eke out one's existence in that country. Poor parents could not have thus borne the additional burden, which the birth of a female child entailed. Thus the easiest way was to get rid of her by killing her. The Holy Qur'an cautioned them-

"And that ye slay not your children because of penury." (6:152)

"We provide for you and for them." (17:31)

The Qur'an was the first scripture to have conceded so many rights to women and that too in a period when women were very oppressed in the major civilizations, namely the Byzantine, Sassanid, etc. And yet we see that the later Fuqaha (Islamic jurists) drew much from the Arab 'adat (pre-Islamic traditions) and resorted to formulations which curtailed, if not trampled upon, women's rights.

The first step, which Islam took in ameliorating the lot of women, was the abolition of this abominable custom. Why be afraid of the birth of a female? It is just possible that a female may bring you laurels, fame and reputation and a male may prove to be the source of disgrace and humiliation. The mother of Mary regretted the birth of Mary and wished that if she were a boy, she could have served better her God. The Holy Qur'an advised,

"All knew best of what she was delivered. The male is not as the female." (Q3:36) Beside, a woman is necessary for the perpetuation of human race. The holy Qur'an further lays down.

"He created you from a single soul." (Q4:l)

"The prophet while convening women to is lam took an undertaking" from them that they would not kill their female children.'" (Q60:12) Prophet Mohammed has observed that education is compulsory for both man as well as woman; there cannot be any distinction on the basis of sex/gender in this regard. Even the slave girls are to be taught as it is considered an act of piety. I am tempted here to reproduce the words of the Prophet. He says,

> *"If a man has a slave girl, and he gives her good education and a proper training setting her free, married her, then such a man will have a double reward."*
>
> *(Bukhari: Kitabul llm)*

It is thus evident from the above that under Islam imparting of education is of vital importance. In fact, it has been considered as a domain of every Muslim irrespective of sex. A duty has been cast on

the shoulders of every Muslim to learn. The Prophet ordained, "It is essential for every Muslim man and woman to acquire knowledge." He had again reiterated, "Seek knowledge though you may have to go China for it."

Once it was observed by him, "Knowledge is the lost property of a Muslim and he should retrieve it, whenever he finds it."

Islam prescribes that when a woman goes out, she should conduct herself in a decent way. She should not flaunt her charms in order to attract the attention of others. In this connection, the Holy Qur'an has injuncted the females in the following way:

"And tell the believing women to lower their gaze and guard their private parts, and to reveal not their adornment save such as is outward." There is a definite purpose behind the above order. More often than not it has been observed, that the women while going out parade their charm. They want to be the cynosure of all eyes. A woman does everything to embellish herself before going out. She would clad herself in the best costume, wear the best jewellery and use the best possible cosmetics to make her cheeks rosy, her lips bud-like and her eyes, like that of a gazelle. This is sufficient enough to attract an evil eye. Thus, all this parading is forbidden as it may lead to grave consequences like rape, outraging of modesty, etc. Women have been instructed to "abstain from evil look, thought, word and deed".

However, a woman has been permitted to open her face and hand, though of course she is instructed to cover her bosom with a wrap of some sort as in the word of the Holy Qur'an, "And to draw their veils

over the bosoms." Obviously the above instructions do not come into operation while she is within the four walls of her house.

There is no prohibition on women attending to outdoor duties. Instances are not lacking when women were deputed to attend sick and wounded soldiers in the battlefield. They were also at tunes assigned die task of bringing the bodies of a dead person to the Madina. They also helped men in outdoor work during the "'Haj" and while circumambulating the "Kabah", they were permitted to open their face and hands.

It is true that Islam permits a man to have four wives at one and the same time. But however, I feel that this is only an enabling provision as is fully manifest from the verse cited below:

> *"And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four but if you fear that you do not do justice (between them) then (marry) only one."(Q4:3)*

Thus those who are incapable of doing justice between the wives are enjoined to have only one wife as is evident from the above observation.

The Qur'an further provides,

> *"Ye will not be to deal equally between (your) wives, however, much ye (to do so)." (Q4: 129)*

If the above two verses are read conjointly then the only inference which can be drawn is that though the plurality of wives up to four is permissible in certain circumstances, there may be a case when a woman is not in a position to perform her conjugal obligations, in that

case, a man may have a second wife—the wife of a person may be unable to give birth to a baby on account of illness or otherwise. Second, in case of war when young soldiers have died leaving a number of widows. All the young girls are not in a position to find suitable matches due to the number of casualties, in such situations the above provisions can come to the rescue of a particular country. For example, such situations developed after the Second World War in Germany and subsequently in Vietnam and Iraq.

If a girl has attained puberty she cannot be given away in marriage to a person without her consent. A marriage without her consent is void ab initio. In case a girl was married before she attained the age of puberty, she can repudiate the marriage after attaining the age of puberty "*khyarul baloogh*".

Dower or "mahr" is essential for the performance of the marriage according to Islamic law. No marriage is possible without it. Mahr can be either in the form of cash or property. It is to be paid by the husband to the wife during the subsistence of marriage or on divorce. It is the property of the woman. She can spend it in any way she likes. She can also will it as per her choice. It is a pecuniary safeguard, which the Islamic law provides for a woman. In my humble opinion, there is no analogous provision in any other law in the world. Being well provided in this way, she would be in a position to live with dignity throughout her life and also command respect from her husband.

Islam is the first religion in the world to have; allowed women a share me property left by her parents/husband. Previously, she did not enjoy any such rights, besides the right of inheritance; she has also been

permitted to earn her own livelihood whatever she earns is hers. To substantiate this point, I would like to cite an observation from the Holy Qur'an:

"To men is allotted what they earn and to women what they earn " (Q4:32)

Islam accords to the womenfolk a pride of place and equality of status to both the sexes. The Holy Qur'an lays down,

"And they (women) have rights similar to those against them in a just manner." (Q2:228)

To illustrate the relationship between the husband and wife the Qur'an referred to them as raiment for one another. To quote the exact words of the Holy Qur'an:

"They are raiment for you and you are raiment for them." (Q2:187)

Further saying "Oh children of Adam, we have revealed unto you raiment to conceal your shame." (7:26)

It is abundantly clear from the above that men and women are complementary to one another. Men must hide the weaknesses and mistakes of women and women on the other hand have been instructed not to humiliate men by exposing them. However, there is a division of work, according to the tenets of Islam between man and woman. A woman is enjoined to look after household affairs whereas man has been assigned the task of outdoor duties. Thus the wife is, the minister of home affairs whereas her husband, the minister of external affairs. The man has been declared as the head of the family in order to run the

affairs of the family smoothly. He has to earn and spend his earnings on the maintenance of the family. But this provision in no way detracts from the position and the status, which a wife enjoys in the family. In what esteem the Prophet held the females is manifest from his following saying:

> *"One who brings up one's daughters, teaches them good manners and morals, arranges their marriages and treats them with fairness deserves to be ushered into paradise."*
>
> *Abu Dawud*

He then observed:

> *"Paradise lies at the feet of the mothers."*
>
> *(As Suyuti)*

Islam is the first religion in the world to have conferred on the wife a right to divorce her husband. Marriage is a contract according to Islamic law and under this contract, both enjoy certain rights and have to shoulder certain responsibilities.

The rule governing divorce has been given out in the following verse of the Holy Qur'an:

> *"O Prophet! When you divorce women, divorce them for their prescribed time, and calculate the number of days prescribed, be careful of (your duty to) Allah, your Lord. Do not drive them out of their houses nor should they themselves go forth, unless they commit an open indecency and there are limits of Allah and whoever goes beyond the limits of Allah, he indeed does injustice to his own soul! You do not know that Allah may after that bring about reunion." (2:231)*

If we scrutinize the above verse, we find that the following conditions must be fulfilled before and after the divorce:

1. Divorce cannot be given without a valid reason.

2. Divorce will take effect not immediately on pronouncement but after the expiry of the prescribed period of time.

3. The wife after the divorce will not" leave the house of her husband but would remain there till expiry of the period of "*iddat*".

4. For the husband, it is mandatory to think over the grave consequences which are likely to follow as a consequence of divorce.

Divorce is considered the most reprehensible act under the sun. It is thus resorted to only in those discerning few cases, when there is absolutely no possibility of living together. To substantiate the above point, I would like to cite a saying by Prophet Mohammed. He is reported to have said, "Of the many things which God has made permissible for man, the most displeasing to God is divorce."

In the above circumstances, every possible effort is to be made for reconciliation between the husband and wife. For the said end, the parties can use the good offices of their near and influential relations. It is only when every effort has failed for conciliation, then the recourse to divorce is taken. Even after the divorce, the wife is to live with the husband during the period of "iddat" in order to enable an opportunity to reconcile. It is just possible, during this period that the husband may think over the good qualities of wife and that the decision of divorce was a result of anger, anxiety and the husband may repent later on and may revoke it. Thus, in case the wife leaves the houses immediately

then the possibilities of compromise are reduced to a minimum. Living together may rekindle the love between them. During the period of "iddat" if cohabitation takes place, then the divorce is automatically cancelled it is, therefore, mandatory that divorce is to be pronounced only when the wife is in a clean state. There cannot be any divorce when the wife is having her menstrual period.

It is amply clear from the above that the Holy Qur'an permits only one type of divorce, which has been narrated above. If a person is permitted to divorce his wife thrice at one sitting, then it becomes irrevocable and the possibility of reunion is lost forever, unless the wife remarries and the said marriage is consummated. Such a divorce I feel would be against Qur'anic injunction. In such a case the wife has to leave the house of her husband and pass the period of "iddat" somewhere else. In fact, the practice of divorcing thrice at one sitting was condemned by the Prophet in the strongest possible terms. It was regarded as trifling with the Qur'an. During the period of Prophet and during the regime of Hazrat Abu Bakr and even for two years during the rule of Hazrat Omar, the pronouncement of divorce thrice at one sitting was regarded as one divorce. However, later on Hazrat Omar yielded to public pressure and issued instructions that once divorce is pronounced, thrice even at a single sitting, the same may be treated as complete and final.

When the wife thinks that it is not possible to live with the husband on account of incompatibility of temperament or any reason, she may seek a separation from her husband, which is technically known as '"khulah". If a woman seeks "khulah", the husband is under an obligation to grant her request. All that he can claim back is the dowry,

and whatever he has given her at the time of the marriage in lieu of divorce-, Rubbia Dinth Muawwiz had sought khulah from her husband but he refused. On being approached, the Caliph Usman declared that her husband could take back, whatever he had given her, but he could not compel her to live with him against her wishes. To the same effect is the decision given by the Prophet in case of Jamila, wife of Sabil.

However the tenets of Islam have not remained isolated from the social & cultural practices of its people. As far as women's question is concerned cultural & traditional influence tend to be quite strong. Unfortunately, many Shariah formulations are based on such traditions and thus many of the rules reflect the cultural prejudices of the Arabs and the Persian rather than the greatness of the Qur'an and its just liberal outlook.

A brief history of the evolution of Sharia law may help in the better understanding of the various factors that led to substantial changes in the liberal outlook of the Quranic injunctions particularly with regard to women's rights in Islam.

Islamic law or the Sharia (literally meaning the path or way) was compiled during the ninth and tenth centuries CE by Muslim jurists, well after the death of the Prophet Mohammed. While the basis of the Sharia is divine in that its principal source, the Quran, is believed to be the word of God. it has also been subject to human reasoning and interpretation by Islamic jurists over the centuries. Differences among Islamic jurists in analogical reasoning led to the evolution of four major schools of Islamic law (i.e. Sunni law - Shias have their own law) viz., Hanafi, Shafi, Maliki and Hanbali.150 All laws agree on the

fundamental dogmas, but differ in the application of the Quran and its interpretation. Jurisprudential difference among the adherents of different schools of law also resulted in varied legal positions for female conduct. Thus, for instance, while all schools agree to the unilateral and extrajudicial termination of marriage by men, women are entitled to judicial divorce under Maliki law.

'Maliki law allows a woman to petition not just on grounds of sexual impotence, as in Hanafi law, hut also on grounds of desertion, failure to maintain her, cruelty, and her husband's being afflicted with a chronic or incurable disease detrimental to her.

Hanafi law, meanwhile, allows women to stipulate conditions in their marriage contracts, although it permits polygamy; the other three schools consider both conditions unacceptable.

These varied interpretations on women do not reflect any frozen, definitive model of future family relationships for Muslim women. Rather, this interpretative diversity illustrates how the Sharia has been subject to human reasoning and interpretation at different historical periods, in varied political, social, economic and cultural contexts. The Sharia is therefore a 'historically conditioned document', 53 combining both divine revelation and human intervention, and was never intended to be the blueprint for all future Muslim societies. Once this point is appreciated it is possible to argue that the different interpretations of the Sharia reflect the constant flux in historical conditions and that the legal principles applied in the ninth and tenth centuries need not be replicated in the twentieth (or twenty-first) century where social, political and cultural conditions differ considerably than those of

seventh century Arabia. Furthermore, as a Muslim scholar commented, 'there are very few women interpreters in the history of Islam because women are seen to be the subject of Islamic Sharia and not its legislators'.151 In the absence of female theologians, there developed a tradition of misogyny among male interpreters of Muslim law. As Zin-al-Din, a Lebanese scholar observed, When I started preparing my defense for women, I studied the works of interpreters and legislators but found no consensus among them on the, subject; rather, every time I came across an opinion, I found other opinions that were different or even contradictory. As for the aya(s) [Quranic, verses] concerning hijab [veil], I found over 10 interpretations, none of them in harmony or even in agreement with the others an if each scholar wanted to support what he saw and none of the interpretations was based on clear evidence.

The contention then is not Islam but historical interpretations of Islam. This is the fundamental premise of the present debate on Muslim women's rights. Women's rights activists need to simultaneously uncover and emphasize the coexistence of patriarchal legal texts with the Quran's spiritual and ethical vision. The voice of the latter is muted-vet unmistakably there- remaining a source of inspiration for all Muslim women who believe in the Islamic vision of equality between men and women. As Leila Ahmed points out, 'Even as Islam instituted marriage as a sexual hierarchy, in its ethical voice– voice virtually unheard by rulers and law makers- it insistently stressed the importance of the spiritual and ethical dimensions of being and the equality of all individuals. While the first voice ha-s been extensively elaborated into a body of political and legal thought, which constitutes

the technical understanding of Islam, the second- the voice to which ordinary Muslims, who are essentially ignorant of the details of Islam's technical legacy, give their assent- has left little, trace on the political and legal heritage of Islam. The unmistakable presence of an ethical egalitarianism explains why Muslim women frequently insist, often inexplicably to non-Muslims, that Islam is not sexist. They hear and read in its sacred, text, justly and legitimately, a different message from that heard by the makers and enforcers or orthodox, andocentric Islam.

This new Islamic order institutionalized women's subordination through the institution of patrilineal marriage laws endorsing the control of women and female sexuality. Laws relating to marriage, the family and women's conduct explicitly endorsed the patriarchal control of women and female sexuality. This preceded the physical seclusion of women, the notion of women's submission to male control, the practice of polygamy and the unilateral (male) right to divorce.

The provision of polygamy, which later translated into classical Islamic law, did not heed the Quranic injunction of the equal treatment of co-wives, nor did it place and restriction on the right of men to enter into polygamous unions. The male right to polygamy was later incorporated into family codes/personal laws. However, this verse could also be interpreted as an endorsement of monogamy as it acknowledges that men may not be able to treat their co-wives equally. This ambiguity and divergent interpretations of Islamic law have to be viewed in the light of its historic evolution and formalization.

3.10 MUSLIM LAW AND JUDICIAL REFORMS

It is needless to reiterate the distinct family laws govern most of India's major religious groups-Hindus, Muslims, Christians, Parsis and Jews-as well as many so-called tribal groups (Hindu law governs Sikhs, Jains and Parsis). Muslim leaders pressed for the retention of legal pluralism far more than the leaders of other religious groups did soon after Indian independence, especially during the debates of the Constituent Assembly. Concerns about the recognition of distinct religious identity were most strongly felt among Muslims in the aftermath of the formation of Pakistan.

While the legislature introduced major changes in Hindu law in the 1950's, major policy makers claimed that they were leaving changes in the laws of the religious minorities to their representatives, who in practice were typically conservative religious and political elites. The conservatism of such elites made major changes in these laws seems unlikely. Nevertheless, some changes took place in Muslim law and in India's other family laws gave women greater rights as compared with the ones enjoyed by them in the last generation. The judiciary was the main agent of change, although legislatures and some religious leaders and religious .institutions also played come roles. However, changes were slower in Muslim community.

Of the three Acts pertaining to Muslim Personal Law in India, the Dissolution of Muslim Marriage Act of 1939 governed the grounds on which Muslim women could get judicially mediated divorce. Another law, the Muslim women's (Protection of Rights on Divorce) Act, governed the rights of Muslim women to post-divorce maintenance

after it was passed in 1986. The other Act, the Muslim Personal Law (Shariat) Application Act of 1937, stated that the Sharia would apply to Muslims in family matters without specifying the rules it recognized, although the 'Islamic laws' applied in different regions of the world vary considerably. The silence of this Act left much of the content of India's Muslim law to the judiciary's discretion.

Indian legislatures gave the content and implementation of Muslim law little attention after independence. Not one of the one hundred and eighty two official Law Commissions of the post-colonial period assessed the functioning of Muslim law or considered possible changes in Muslim law. Only a few legislative changes were introduced in Muslim law through the instrumentality of the pieces of legislation mentioned above after independence.

The above discussion clearly spells out that a woman under Islam occupies a position of eminence. It grants her an equal status with man. In fact the status of Muslim women in India as that of any other woman in the country is interconnected with their social and economic upliftment in the country. In case we are in a position to empower them economically and socially, it would lead to a rise in their status. I am in perfect agreement with Quarratualin Hyder when she says that "Muslim women are as modern and as backward as their counterparts in the various income groups in other communities. The various economic and sociological problems of Muslim community cannot be isolated from the problems of the general backwardness and poverty of India masses."

3.11 STATUS OF WOMEN IN CHRISTIAN SOCIETY

Beliefs about the roles and responsibilities of women in Christianity vary considerably today as they have during the last two millennia. This is especially true for women in both marriage and ministry.

Christianity has traditionally given men the position of authority in marriage, society and government. This position places women in submissive roles, and usually excludes women from church leadership, especially from formal positions requiring any form of ordination. The Catholic and Eastern Orthodox Churches, and many conservative Protestant denominations assert today that only men can be ordained-as clergy and as deacons.

Many progressive Christians disagree with the traditional male-authority and female-submission paradigm. They take a Christian egalitarian or Christian feminist view, holding that the overarching message of Christianity provides positional equality for women in marriage and in ministry. Accordingly, some Protestant churches now ordain women to positions of ecclesiastical leadership.

Despite these emerging theological differences, the majority of Christians regard women with dignity and respect as having been created alongside men in the Image of God. The Bible is seen by many as elevating and honoring women, especially as compared with certain other religions or societies. Women have filled prominent roles in the Church historically, and continue to do so today in spite of significant limitations imposed by ordination restrictions.

Women's behavior was extremely limited in ancient times, much as the women of Afghanistan during the recent Taliban oppression. They were:

- Unmarried women were not allowed to leave the home of their father without permission.
- Married women were not allowed to leave the home of their husband, without permission.
- They were normally restricted to roles of little or no authority.
- They could not testify in court.
- They could not appear in public venues.
- They were not allowed to talk to strangers.
- They had to be doubly veiled when they left their homes.[16]

Christian priests went to the extreme of considering the woman as the cause of "original sin" and the source of all catastrophes from which the entire world has suffered. For this very reason, the physical relationship between man and woman has traditionally been labeled as "filthy" or "dirty" even if it were officially done and performed within a legitimate marriage contract.

Saint Trotolian says:

> *"Woman is the Satan's pathway to a man's heart. Woman pushes man to the "Cursed Tree." Woman violates God's laws and distorts his picture (i.e. man's picture).*

[16] www.religioustolerance.org

Wieth Knudesen, a Danish writer, illustrated the woman's status in the middle ages saying:

> *"According to the Catholic faith, which considered the woman as a second class citizen, very little care and attention was given to her."*

In 1586 a conference was held in France to decide whether women should be considered as human beings or not. The conference came to a conclusion that: "Woman is a human being, but she is created to serve man."

Thus, the conference approved the rights for women as human beings, a matter that was previously in doubt and undecided. Moreover, those who attended the conference did not decide on full rights for the woman, but rather she was a follower of man and a maidservant to him with no personal rights. This decision was in effect until 1938, when, for the first time, a decree was issued to abrogate all the laws that forbid a woman from conducting her own financial affairs directly and opening a bank account in her own name.

Europeans continued to discriminate against women and deprive them of their rights throughout the Middle-Ages. It is also surprising to know that English laws turned a blind eye to the selling of one's wife! The rift between the sexes, men and women, continued to increase, so much so that women became fully under the control of men. Women were stripped completely of all their rights and whatever they owned.

All that a woman owned belonged to her husband. For instance, until very recently women, according to the French law, were not considered capable of making their own financial decisions in their

private ownership. We can read *article 217* of *the French law* that states:

> *"A married woman has no right to grant, transfer, bond, own with or without payment, without her husband's participation in the sale contract, or his written consent to it, regardless of whether the marriage contract stipulated that there should be a complete separation between the husband's and wife's possessions and ownership of various items."*

Despite all amendments and modifications, which occurred in these French laws, we can still see how these laws are affecting married French women. It is a form of civilized slavery. Furthermore, a married woman loses her surname (family's name) as soon as she enters into a marriage contract. A married woman shall carry the family name of her husband. This, of course, indicates that a married woman will only be a follower of her husband and she will even lose her personal identity.

Bernard Shaw, the well-known English writer says:

> *"The moment a woman marries; all her personal possessions become her husband's in accordance to the English law."*

Lastly, there is one more injustice that has been imposed upon the woman in the Western society which is that a marriage bond is made to last forever, in accordance with legal and religious teachings. There is no right of divorce (according to Catholicism, at least). Husband and wife are only separated from each other physically. This separation may have contributed to all sorts of social decay and corruption, such as having affairs, mistresses, boyfriends, girlfriends, as well as possibly prostitution, and homosexual and lesbian relations. Moreover, a

surviving widow is not given the chance to remarry and lead a normal married life after the death of her husband.

No doubt, what is called modern western civilization and which endeavors to dominate the globe, is indebted to the Greek and Roman traditions for its civil foundations, and to the Judaic-Christian traditions for its ideological and religious foundations. The abuses mentioned above collectively led, due to gradual and eventual effects of technological and social modernization, to the expected and natural reaction: movements demanding women's rights in the society, led by thinkers, educators, lobbyists, and human rights and women rights activists.

The pendulum was set to swing in the other direction, and they demanded absolute equal rights and liberation from male chauvinism and abuses. In many of the modern secular societies, women are indeed given numerous equal rights, but at the same time, equality has exposed them to the molestation and double standards rampant in the immoral materialistic culture that markets her as an object of sexual desire, for sale, contract or rent. The ensuing breakdown of the family unit, and the widespread sexual immorality, abortion, homosexuality, and criminal deviancy from sexual liberation, has led to some counter reactions in the society, especially from the religious conservatives, but apparently, the trends are too strong to turn the tide back.

In this global context, and from this historical legacy, we will present the salient features of women's rights in Islam and shed light on some common misconceptions in order to show the superiority of following

Allah's guidance rather than men and women guiding each other by whim and desire.[17]

3.12 PARSI WOMEN IN INDIA

Parsi Women enjoy a respectable position in their society with respect to their sisters of other communities.

Parsi women occupy a much more honourable and independent position with regard to either their Mohammedan or Hindu sisters in society. As per scholars a high authority on Zoroastrian scriptures, `the position of a female was in ancient times much higher than it is nowadays. They are always mentioned as a necessary part of the religious community. They have the same religious rites as men; the spirits of deceased women are invoked as well as those of men.` A Parsi man usually makes an affectionate and good husband, and discharges honestly his matrimonial duties, and the woman is evenly conscious of her duties towards her master and lord. Thus their families normally lead a peaceful and happy life.

Women of Parsi community perform a vital role in all domestic concerns untrammeled by the heavy shackles which caste and usage have imposed on in Hinduism and Islam. They also engage themselves in dress-making for themselves and their children. Some also have taken to embroidery and a number of other works done by the ladies. Parsi women of poorer classes usually engage themselves in the kitchen and in sewing either for domestic or for commercial use.

[17] womeninislam.ws

The subject of discussions among the Parsi ladies is limited to their dress and latest fashions or regarding some forthcoming betrothals and marriages. The subject of current political scenario influences then a little and their criticism hardly went beyond the limits of innocent wonder. However, the scenario is changing with Parsi ladies taking the lead in female education.

The utmost desire of a Parsi girl is to have a good husband and once this objective has been attained her position is secured and her happiness may be regarded as complete. As a woman, she is loving, cheerful and likes children and always seen with them grouped around her. Thus, the mother in a Parsi family is the soul and centre of all its happiness. The women of this community are also good neighbours and assist their neighbours in their bad times. This praiseworthy practice of being helpful to one`s neighbour has passed into a proverb; `Our neighbours are like our fathers and mothers`.

Previously, like the Hindus and Muslims, Parsi women of the upper and middle classes did not appear in public. They never joined the company of the men, nor did they even venture to drive out in open carriages by themselves. However, presently the Parsi ladies of all classes can be seen in public just like the ladies of the western world. Half a century ago Parsi women of the middle and better classes were hardly seen on foot but this has also been changed in recent years. Since the reformation of Back Bay in Mumbai hundreds of the Parsi fair sex is noticed every evening strolling there and taking pleasure in the pure sea-breeze.[18]

[18] Idianetzone.com

Zoroastrian religion does not discriminate between men and women. Leaving aside the differences with regard to religious observances and role responsibilities, both the sexes are treated equally in the religious texts. Unlike in the Vedic religion there is no preferential treatment for male children. There is no such argument that male children are necessary for the deliverance of parents into the ancestral world. The initiation ceremony, Naujot is performed for both male and female children. Of the six Immortal Beings created by God, three are feminine and three are masculine. According to the *Bundhahism*, "the sky, metal, wind, and fire are male, and are never otherwise; the water, earth, plants, and fish are female, and are never otherwise; the remaining creation consists of male and female." Both men and women have equal importance in protecting the sanctity and divinity of the world. Children are advised to honor both mother and father equally.

According to the Zoroastrian theories of creation, both men and women originated from the seed of Gayomard, the primeval man. When he was attacked by the evil forces, before passing away, he gave forth seed. The seed developed into Matro (Mashye) and Matroyao (Mashyane). They grew up from the earth like a plant united below the waist, whereby it was difficult to know who was male who was female. Ahura Mazda separated them from each other and changed them from plant into the shape of man. To them He said, "You are man, you are the ancestry of the world, and you are created perfect in devotion by me; perform devotedly the duty of the law, think good thoughts, speak good words, do good deeds, and worship no demons!" After receiving instructions from God they decided to follow His commandments.

However soon they were attacked by the evil forces and their minds were corrupted.

Zoroastrian scriptures suggest that women are prone to the temptations of evil and therefore should be kept under regular watch. Women are expected to follow the example of *Spenta Aramaiti* and cultivate the qualities of love, devotion, sincerity and perfection. According to *Arda Viraf*, women who are desirous of going to heaven should honor water, fire, earth, trees, cattle and sheep and all the good creations of God. They should perform the religious ceremonies sincerely and offer prayers and service to God and the spiritual beings. They should show reverence and obedience to their husbands and lords and should practice the faith of Mazdayasnians without doubt. They should practice good thoughts, good words and good actions and abstain from sin. Adultery and unnatural intercourse are regarded as sins of heinous kind.

The Denkard classifies women on the basis of their conduct into four classes: "good as well as bad; not bad, and good; not good, and bad; and neither good nor bad. From among these any woman who is not bad and is good should be selected to manage household affairs and to give happiness and comfort to the master of the house. And to keep oneself free from unhappiness she who is good and bad ought not to be obtained; and (men) should positively keep aloof from choosing, from among the two descriptions of women mentioned above, her who is not good and is bad, over her who is neither good nor bad."

The *Meno-i-Khard* describes the best of women as "The woman who is young, who is properly disposed, who is faithful, who is respected,

who is good-natured, who enlivens the house, whose modesty and awe are virtuous, a friend of her own father and elders, husband and guardian, handsome and replete with animation is chief over the women who are her own associates."

Zoroastrian scriptures prohibit inter religious marriages. Followers are urged to marry within the religion to ensure the practice of righteousness without any complications. The texts suggest to select women who are wise and modest and firmly anchored in the religion. As for the son-in-laws they should be good natured, honest and experienced, even though they may be poor.[19]

[19] www.hinduwebsite.com

Part-II

EMPOWERMENT OF WOMEN THROUGH DIFFERENT RELIGIOUS SYSTEM

Chapter-1: Marriage

Chapter-1

MARRIAGE

1.1 INTRODUCTORY REMARKS

India is only country in the world which permits persons belonging to different religious to follow their own personal laws based on religion. Thus in respect of personal matters like marriage, divorce, succession and maintenance, different personal laws are followed, depending on the religion of the person. This gave rise to different marriage laws, succession laws and divorce laws, applicable to different religions like Hindusim, Islam, Christianity and Parsis.

Marriage is the very foundation of human civilization and civil society. The institution of marriage has been made sanctified and sacrosanct so much so under most of the systems that prevailed sometime or other in the world that it began to be adored and worshipped by their adherents who pushed its objective to the background in course of time. As a result, society in general and women in particular were hard hit. In the late eighteenth century, the French Revolution, the democratic ideas and industrialism came to drive the blow on the base of the very fetish character of this institution. Hereafter people began to raise doubt on the relevance and utility of marriage as an institution. Some sociologists attempted an empirical study to see if an alternative to marriage is at all possible. In this part of the Indian sub-continent four major communities, Hindus, Muslims, Christians and Parsis hold their respective system of marriage. In India, laws on marriage and divorce from part of the personal laws. In respect of these subjects each

community is governed by its own personal laws deriving sanctity from religion. In addition there exists a secular law providing for a civil form of marriage. It is the Special Marriage Act, 1954. This can be availed by the persons domiciled in India regardless of their faith. Besides, any existing religious marriage can be registered under the Special Marriage Act, 1954.

In India, different set of laws and rules are applied in respect of marriage depending on the religion followed and practiced by the individuals. Thus the Hindus are governed by the Hindu Marriage Act, 1955, the Muslims are governed by the tenets of Holy Quran and the Christians are governed by the Christian Marriage Act, 1872 and other laws.

Marriage is one of the most important of all *Samaskaras* under the *Gryha Sutras*. According to Apasthamba, "Marriage was meant for doing good deed and for attainment of Moksha". Among the Hindu the marriage was considered as a sacrament. It was obligatory for every Hindu through which his well conducted life progresses to its appointed end. The rationale behind such sacramental character was to make the spouse physically, psychically and spiritually united. Thus marriage is an association for life here and hereafter, productive of full partnership with temporal and divine rights and duties. In *Tikait v. Basant*[1] it was held that marriage under Hindu law was a sacrament, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world. Wife is *ardhangini,* half of her husband.[2] It was held that the marriage was the last of ten sacraments enjoined by the

[1] ILR 28 Cal. 758
[2] *Satpatha Brahmana v.* 16. 10.

Hindu religion purifying the body from inherited taint. Thus marriage is a religious necessity rather than mere physical luxury. A Hindu has to marry for a son who alone can save him from *narak* (hell) after death. It was also observed by the court that marriage was binding for life because a marriage performed by *saptapadi* before consecrated fire was a religious tie which could never be united.[3]

Now a relevant question arises whether Hindu marriage continues to be a sacrament even after the Hindu Marriage Act, 1955. Some of the judges are inferring that in the light of the changes effected by the Hindu Marriage Act, 1951 Hindu marriage is no longer a sacrament. For instance, Justice Saharya of the Delhi High Court quotes with approval in *Dhanjit Vadra v. Beena Vadra*[4] the observations of a division bench of the Andhra Pradesh High Court:

> *"Section 13-B radically altered the legal basis of a Hindu marriage by treating it as an ordinary form of contract which competent parties can enter into and put an end to like any other contract by mutual consent."*[5]

In view of the above *shastric* texts and judicial decisions, we can say that the sacramental marriage among Hindus has three main characteristics. First, it is a permanent union. That means, it cannot be dissolved on any ground whatsoever. Secondly, it is an eternal union *(Janma-janmantar bondhari),* extending to series of births. Its implication has been that widows' remarriages, as a rule, were not recognized in Hindu law.[6] Thirdly, it was a holy or sacrosanct union. This implies that such a marriage cannot take place without the

[3] *Shivonandh v. Bhagawanthumma,* AIR (1962) Mad. 400.
[4] AIR 1990 Del. 146 at 151.
[5] K Omprakash V.K. Nalini, AIR 1986 AP 167 at 169.
[6] Paras Dewan, *Modern Hindu Law* (sixth ed.)

performance of sacred rites and ceremony.

It is now clear that the first characteristic of sacramental marriage has been affected by Hindu Marriage Act, 1955, for Hindu marriage can be dissolved on certain grounds specified under Section 13 of the Act. The second characteristic was wiped out with statutory recognition of widow marriage in 1856. 'Probably to some extent the third characteristic' is still retained'.[7] In most of the Hindu marriages, a religious ceremony is still sine qua non. Viewed from this side, one may conclude that Hindu marriage has not remained purely a sacrament and at the same time it has become completely a contract. As Paras Diwan has observed:

> *"It has semblance of both. It has a semblance of a contract as consent is of some importance; it has semblance of a sacrament as in most of marriages a sacramental ceremony is still necessary."*[8]

1.2 HINDU WOMEN AND MARRIAGE

The law relating to Hindu women and marriage can be better understood, if the position before the codification of Hindu laws is made clear.

(a) Position before the Hindu Marriage Act, 1955

Prior to 1955, that is before the enactment of the Hindu Marriage Act, 1955, the Hindu Marriage was considered purely to be a sacrament, by all the schools. There were eight forms of marriage among Hindus, out of which four were approved forms and the rest unapproved. The

[7] M.P. Tiwari, "Indissolubility of Hindu Marriage and Divorce by Mutual Consent", Law Review (Vol. II) p. 59.
[8] Paras Dewan, Supra note 6.

approved forms of marriage were Brahma, Daiva, Arsha and Prajapathya. The unapproved marriages were Asura, Gandharva, Rakshasa and Paisacha. In due course of time only two forms remained in practice viz 'Brahma' in the approved form and 'Asura' in the unapproved form. In the former type, the women were given as a gift by her father to his son-in-law i.e. the husband of the women. In the latter type, it was considered as a sale by the father to the son-in-law, "Kanya Sulkam" was the consideration for such sale. Another difference was that in a Brahma form of marriage, when the woman died, her property devolved upon the legal heirs of the husband, in the absence of the husband and children. In 'Asura' form of marriage, on the death of the wife, in the absence of her husband & Children, her property devolved upon her parental side. Polygamy was an accepted practice and there was no limit on the number of women, a Hindu man could marry. Widow remarriage was prohibited till the reformers like Raja Rammohan Rai and Kandukuri Veereshalingam made some bold attempts to introduce them. Child marriages were rampant, inspite of sustained efforts by certain reformers.

(b) Position after the Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 was the first of the codified Hindu laws. The Act does not specifically provide for any form of marriage. It made the marriage more consensual and secular than religious. It no more considers the marriage as a 'Samskara' as considered by Dharma Sastras. The marriage is solemnized as per the customary ceremonies prevalent in the community to which the bride and bride groom belong:

The Hindu Marriage Act, 1955 (Hereinafter referred to as the Act for convenience) amended and codified the Hindu law relating to marriage. The Act underwent several amendments by the Hindu Marriage Amendment Act (Act 3 of 1956), (Act 44 of 1964). The Marriage Laws Amendment Act (LXVIII of 1976) and the Child Marriage Restraint Act of 1978.

The Hindu Marriage Act has made elaborate provisions as to the conditions for a Hindu marriage, ceremonies, registration, legitimacy of children, nullity of marriage and divorce etc. Even though almost all the provisions are equally applicable to the Hindu husband and wife, a few provisions may be discussed to understand the changed position of the Hindu woman after the Act came into force.

Section 5 of the Act lays down the conditions for a Valid Hindu Marriage. They are: i) Monogamy, ii) Sound mind, iii) a minimum age of 18 years for the girl (bride) and 21 years for the boy (bridegroom), iv) The parties are not within prohibited degrees of relationship, and v) The parties are not Sapindas to each other.

The last two conditions may be waived if there is a custom or usage governing each of the parties to the marriage permitting the same.

The Hindu Marriage Act, 1955 introduced radical changes in the marriage laws of Hindus. Section 5 has the effect of abolishing the prohibition on widow remarriage, child marriage and polygamy in one stroke. The woman stands on the same footing as the man in all these matters.

Before 1978, Section 6 of the Act provided that the consent of

Guardian was necessary for a bride, if she was below the age of 18 years i.e. minor. However the Child Marriage Restraint (Amendment) Act of 1978 deleted this section in view of the fact that the age of the bride should be atleast 18 years at the time of marriage. Therefore when the bride has already completed 18 years of age, the question of consent of guardian would not arise as she would be a major.

A package of mutual rights and responsibilities emanates from marriage. Consortium is one of such important rights. In case one of the parties to marriage refuses to discharge his or her marital duties, the prejudiced has the right to get them enforced by resorting to the court of law.

Section 9 of the Hindu Marriage Act, 1955.

When either the husband or the wife has, without reasonable excuse, withdrawn from society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation- where a question arises whether there has been reasonable excuse for withdrawal from the society the burden of proving reasonable excuses shall be on the person who has withdrawn from the society.

The remedy for restitution of conjugal rights has been incorporated under Section 9 of the Hindu Marriage Act, 1955. Accordingly either spouse under the Act can claim the remedy by way of a petition to the

court. The aggrieved spouse has to prove that the other spouse has without reasonable cause withdrawn from the society of the petitioner. If the court is satisfied to the effect that the statements averred in the petition are true and no other legal ground exists to ignore the petitioner, it may pass the decree for restitution in favour of the petitioning spouse. This apart, under Section 9(2), the proper defences to assail the petition are laid down.[9]

Restitution of Conjugal Right is a right available to both the spouses i.e. wife and Husband equally. This provision has been challenged as unconstitutional and as violative of Article 14 and 21 of the Constitution in *Sarita v. Venkatasubbaiah.*[10] Justice P.A. Chowdhary of the A.P. High Court expressed the view that Section 9 of the Act offends Articles 14 and 21. The learned judge held that the effect of decree of restitution of conjugal rights is to coerce the unwilling party to have sex against that person's consent and free will thus allowing. one's body to be used as a vehicle for another human being's creation. Section 9 was held to violate the right to privacy of the individuai also.

However the Supreme Court overruled the above decision of the A.P. High Court recently in the case of *Saroj Rani v. Sudarshan* by holding that in the privacy of home and married life, neither Article 21 nor Article 14 has any place. It rnay be mentioned in this context that this remedy has been abolished an England by Section 20 of the Matrimonial Proceedings Act, 1970. However in India Section 9 affords a remedy to the aggrieved wife against the husband deserting her without any reasonable cause. If the court passes a decree in her

[9] For details, Section 9(2), Hindu Marriage Act, 1955
[10] AIR 1983 A.P. 356.

favour it can be executed as per the procedure contained in Civil Procedure Code.

Section 10 of the Hindu Marriage Act, 1955 declares the right of either spouse to a marriage for obtaining Judicial separation. This provision is a statutory recognition of the right to Judicial separation among Hindu spouses.

Section 10 of the Hindu Marriage Act, 1955 which contains the provisions runs as follows:

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petitions rescind the decree if it considers it just and reasonable to do so,

Section 10 of the Hindu Marriage Act, 1955 incorporates various grounds on which the remedy can be availed by the Hindu wives. It mentions the outcome of the decree and that such a decree can be rescinded by the court at the instance of either to the decree, if the

court feels satisfied to do so.

Under the new Hindu Marriage Act, judicial separation has been given a retrospective effect and the remedy was made available to either spouse. A petition for judicial separation by wife can succeed on any of the grounds mentioned in sub-section (1) and (2) of Section 13, while the husband can avail only those grounds incorporated in sub-section (l).

Besides Section 10 of the Hindu Marriage Act, 1955 Section 18 of the Hindu Adoptions and Maintenance Act, 1956 also entitles the Hindu wife to separate maintenance The grounds for maintenance under Section 18 of the Hindu Adoption and Maintenance Act are the same as have now been made available by the amendment of 1976 for judicial separation such as existence of another wife, his keeping a concubine, his conversion to another religion and any other cause which may justify his separate living.

While the scope for judicial separation under Hindu Marriage Act, 1955 has been kept limited, that of Section 18 of the Hindu Adoption and Maintenance Act has been a little too much. The latter extends to the Hindu wife the right to live separately on any justifiable ground. It has been observed that impact of this Act on the earlier enactment has been profound. It was held by the Punjab High Court that the measures taken by the legislature had laid down a new foundation of equality of husband and wife.[11] However, inspite of the Hindu Marriage Act, the Hindu married women's position could not be emancipated. Therefore, the Indian Parliament has passed the Hindu Marriage Amendment Act,

[11] *Ram Prakash v. Savitri Devi,* AIR 1958, Punjab 87 (FB).

1976, by virtue of which the provisions of divorce has been liberalized 'Now we have to wait and see how far these changes will help the Hindu women. ... Merely introducing changes by way of legislation will not improve the status of Hindu women. If we want to change the condition of woman there must be social change to improve their status.[12]

A few relevant judicial pronouncements are referred below in order to assess the recent trends:

Ishwar Kanta v. Om Parkash[13]

The appellant, Smt. Ishwar Kanta, was married to the respondent on April 13, 1976. A son was born to the couple on September 9, 1977. On September 29, 1981, the respondent husband filed a petition under Section 13 of the Hindu Marriage Act, 1955, alleging that the wife was guilty of cruelty and desertion for a period of more than two years immediately prior to the filing of the petition. He further alleged that she was suffering from schizophrenia of such a kind that it was not safe for him to stay with her. The learned trial court judge found that the present appellant was guilty of cruelty and desertion. Accordingly, on July 21, 1982 the learned trial court judge passed a decree for judicial separation. The appellant approached the High Court in an appeal which has been dismissed by the learned Single Judge. Aggrieved, the appellant has filed the present Letters Patent Appeal.

Another fact which deserves mention is that on March 13, 1982 the appellant filed a petition under Section 9 of the Act for restitution of

[12] M.A. Qureshi, *marriage and Matrimonial Remedies,* (1978)
[13] I(1994) DMC 39 (DB) P&H High Court.

conjugal rights. This petition was not contested by the respondent-husband. As a result an *ex parte* decree for restitution of conjugal rights was passed against him on May 28, 1982.

Upon this, the court held that it was the admitted position that the parties have not stayed altogether since July 7, 1979. Furthermore, it is also apparent that in spite of having obtained an *ex parte* decree for restitution of conjugal rights, the appellant had refused to stay with her husband. As such, it is clear that the marriage has irretrievably broken. Accordingly, the appeal was dismissed.

Souruia Sanjey Karkhanis v. Sanjay Surendra Karkhatis[14]

> *"It will be necessary to state at the outset that both the parties are well educated and employed. The husband first filed the petition seeking decree of divorce alleging cruelty on the part of the wife. He sought decree under Section 13(1) (ia) of the Hindu Marriage Act. The said petition was bearing No. 371 of 1989 and was filed on 1-2-1988. The husband filed another petition for decree of divorce on the ground of desertion i.e. Section 13 (1) (ib) of the Hindu Marriage Act. The said petition bearing no. 1185 of 1989 was filed on 21.8.89. In the said petition, the husband alleged, that the wife has left the matrimonial house without his consent on 2.5.87 and she does not intend and was not prepared to come back to the matrimonial house as she was interested only in service. Two years have passed prior to the filing of the petition she was staying separately and therefore he was entitled to get the said decree."*

The petition filed by the husband seeking divorce on the ground of cruelty came to be dismissed in which it was held that the husband had failed to establish those allegations. Thus petition seeking decree of divorce on the ground of desertion came to be allowed partly and

[14] I(1994) DMC 100 (DB) Bombay High Court

instead of decree of divorce, the learned Judge granted the decree for judicial separation by exercising under Section 13-A of the Hindu Marriage Act.

Sudeskna Kar v. Dr. Abhijit Kar[15]

> *"In this case the wife was living separately and there was no genuine attempt on the part of the husband to bring back his wife to matrimonial home. It was held that the wife having good reason for leaving her matrimonial home specially in view of the fact that her fine sentiments and susceptibilities as educated and cultured lady was mortally wounded by the acts of her husband's parents and specially the mother-in-law and in the absence of accompanying intention to bring cohabitation permanently to an end the cruelty, as alleged, cannot be said to have been proved. There is no sufficient material on record to hold that the wife misbehaved or quarreled with her husband or member of his family. Those allegations have not also been proved".*

The court in this case was hesitant to grant a decree for divorce on the ground of irretrievably break down of marriage as the party seeking divorce failed to prove those grounds strictly. The court instead granted judicial separation.

On the question of custody of the minor child the court held at the same time that for the proper welfare and the education of the child, the child should be allowed to stay with her mother. The husband holds a transferable job and as such it will not be beneficial for the child to stay with his father, that is, petitioner.

Hilda Basant Lal v. Lt. Col. Basant Lal[16]

[15] I(1995) DMC 401 (DB) Calcutta High Court
[16] I(1994) DMC 185 Delhi High Court

In the petition under Sections 22 and 23 of the Indian Divorce Act, the petitioner (wife) has prayed for judicial separation and also for grant of permanent alimony under Section 37 of the Act to the extent of Rs.60 lakhs which would be about half of the respondent's income. Along with the petition under Sections 22 and 23 of the said Act, the petitioner has also filed the present application under Sections 27 and 28 of the Act seeking restraint order against the respondent husband from selling, renting out or alienating in matter of the property No. X-37, Green Park, New Delhi. On 01-10-1992 when the matrimonial reference and the present application came up for preliminary hearing, this court passed the following order:

"In the meanwhile, the respondent is restrained from alienating or transferring in any manner property bearing No. X-37 Green Park, New Delhi. The respondent will also not interfere in the use and occupation of the said property by the petitioner".

Smt. K. Vinayamani v. K. Subramanyam[17]

"This is an appeal filed by the wife challenging the order of the second Additional Judge, City Civil Court, Hyderabad dissolving the marriage between the parties by granting a decree of divorce. The husband filed an application under Section 13(1-A) (i) of the Hindu Marriage Act, 1955 seeking dissolution of marriage between the parties by a decree of divorce. He stated in his application that marriage between the parties was solemnized according to the Hindu Custom on 09-08-1974 and the same was consummated immediately. Later on a son was born during the wedlock on 22-7-1975 who was aged 7 years by the time of

[17] II (1995) DMC 320 (DB) A.P. High Court

the filing of application. The husband alleged that the wife deserted and living away from him in her parents' house. According to him ever since 1977 she never returned to the house. The wife herself filed O.P. 25/86 on the file of the said court seeking judicial separation on the ground of desertion by the husband. In the said proceeding the husband remained *ex parte* and did not contest it with a view that better sense would prevail on her and on her parents and also for facilitating reconciliation between the parties. In the said O.P.25/86 a decree for judicial separation was passed in favour of the wife on 25-4-1986. Alleging that there was no resumption of cohabitation or reconciliation after the passing of the decree for judicial separation on 25-4-1986 the said application has been filed. The husband also referred to the fact that far from any reconciliation between the parties, the wife filed suit O.S. No. 1177 of 1986 on the file of the Second Additional Judge, City Civil Court, Hyderabad, against him for her maintenance and maintenance of her minor son. The filing of the suit indicates that there was no possibility of the parties coming together and leading a marital life and, therefore, the application was filed stating that the statutorily required period has elapsed and that he is entitled to a decree for divorce.

Held: When once a decree for judicial separation was passed under Section 10 either party to a marriage can present a petition for dissolution of marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation. Therefore, a plain reading on the section indicates that either party to the marriage, irrespective of the fact as to

who is the successful party in the earlier application for judicial separation, can approach the court under Section 13(1-A) for a decree of divorce on the ground that there was no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. The section does not say that a successful party in the earlier proceeding for judicial separation alone is entitled to file the application under Section 13(1-A). This is clear indication of legislative intendment even though a person suffers a decree for judicial separation, yet that party also can approach the court under Section 13(1-A) seeking a decree for divorce. It is also well settled that a decree passed for judicial separation or for restitution of conjugal rights etc. against a party cannot be treated as "wrong" or "disability" within the meaning of Section 23 (1)(a) of the Act as against the said party. It is also well-settled that Section 13(1-A) is subject to Section 23(1)(a) of the Act."

And, therefore, the appeal was dismissed:

The case study in the preceding pages shows that the courts are gradually freeing themselves from the snare of male obsession. The interests of wife and welfare of children are receiving ardent attention of the courts. This is surely a firm and positive step towards achievement of woman's higher status in the society where gender justice was a dream and women were used to receiving the bottom rock priority down the ages.

The Supreme Court has explained the consequences of Judicial separation in *Jeet Singh v. State of UP.*[18] The Judicial sanction of

[18] *Jeet Singh v. State of UP* (1993) 1 SCC 325

separation creates many rights and obligations. A decree or an order for Judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage, It affords an opportunity for reconciliation and adjustment. Though Judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live separately keeping their status of wife and husband till their lifetime.

The grounds for Judicial separation for both the husband and wife are the same as the grounds for divorce contained in Section 13 (1) of the Act. They are Adultery, cruelty, desertion, conversion, unsound mind, veneral diseases, incurable leprosy, renunciation of the world, presumptipn of death and failure to comply with a decree of restitution of conjugal rights etc. All these grounds are available equally to the husband and wife.

Apart from the grounds aforementioned, a Hindu wife may invoke any of the following grounds exclusively available to her. viz.,

(a) Remarriage by Husband

(b) Husband found guilty of rape sodomy or bestiality

(c) Non-resumption of co-habitation inspite of a decree for aintenance of wife and

(d) option of puberty i.e. at the option of the wife if her marriage was performed before her 15 years of age and she repudiates the

marriage after attaining the age of 15 years but before the reaches 18 years of age.

These special grounds have been provided for Hindu wife exclusively by the Marriage Laws (Amendment) Act, 1976 which amended Section 10 and 13 of the Act. The object of this provision is mainly to give time to the spouses for rapprochement and reconciliation. Thus a wife can proceed against the husband on more special grounds than mat are available to both the spouses. This provision no doubt places the Hindu wife on a better pedestal compared to the Muslim and Christian wives.

The belief of the ancient Hindu clergymen in an absolute indissolubility of marital role of *tyaga,* might have been based on a misreading of the holy *Dharma shastras.* For this reason and for adapting the law to the demands of time, it could have been inevitable for the reformers of Hindu law to open up the doors of divorce. So the divorce was first legalized by customs here and there and then locally by regional laws[19] and or the whole country by parliamentary legislation.[20] Thus the Hindu Marriage Act, 1955 was the first central enactment which revolutionized the matrimonial reliefs under various circumstances. Divorce, therefore, could be obtained by either party on grounds of adulterous life, conversion, incurable unsoundness of mind, virulent and incurable leprosy, communicable venereal disease and renunciation of the world by entering any religious order, of the other party A petition for divorce could also be made if the respondent had not been heard of as being alive for a period of seven years or more by

[19] In Bombay, Madras, Saurastra, UP, Baroda and Mysore.
[20] Tahir Mahmood, *Personal Law in Crisis,* New Delhi (1986).

those persons who would naturally have heard of it had he or she been alive. Besides these, non-resumption of cohabitation after a decree of judicial separation and failure to comply with a decree of restitution of conjugal rights, for a period of two years (which has been reduced to one year by the amendment of 1976) or upwards also gave a right to the decree holder to apply for a divorce. Apart from these grounds, which were available both to the husband as well as to the wife, the wife was given additional grounds to present a petition for the dissolution of her marriage. These grounds were: pre-Act bigamous marriage of the husband (provided the other wife was alive at the time of the petition) and acts of sodomy, rape or bestiality on the part of the husband. [The Marriage Laws (Amendment) Act, 1976 has added two more grounds to this.] Thus, we see that the grounds available for divorce were predominantly based on fault of the other party whether it was voluntary, accidental or natural. The presence of break down grounds, however, could not be wholly denied. For instance, divorce on the ground that the other party had not been heard of as being alive for seven years or more showed an element of break down rather than fault of any party. Moreover, within a decade of passing of the Hindu marriage Act, 1955, amendments started trickling in thereby making divorce more easy and liberal. Mention may be made of an Amendment made in 1964 to section 13(1) of the Act.

Thus the result was that whereas before 1964 only the decree holder could apply for a divorce on the ground of non-resumption of cohabitation for a period of two years or more after obtaining a decree of judicial separation or restitution of conjugal rights, after the Amendment of 1964 even the party against whom the decree was made

could apply for divorce The idea behind tins amendment was to end stalemate, *since, quite, often* a party might simply keep quiet after obtaining a decree. He or she might choose to neither comply with the decree nor obtain a divorce. Thus, the other spouse was faced with a difficult situation, he had no *locus standi* to apply for divorce and obtain freedom.

A perusal of the statement of objects and reasons[21] would show that a deliberate beginning, though in a limited way, was made in 1964 towards the introduction of break down theory of divorce. The basis of such ground, however, still rested on faults.

A further step towards the recognition of the principle of break down as a ground for divorce and further liberalization of the divorce law was taken up in 1976 when divorce by mutual consent was inserted into the Hindu Marriage Act.

It cannot be ruled out that a system which permits divorce on the fault of the other party has a number of flaws. Under the fault system of divorce, parties whose marriage has obviously broken down are impelled to live together in law. In absence of a technical fault viz., the fault grounds enumerated in the divorce section, no divorce can be granted. Similarly when both parties are at fault- the "clean hands theory" of equity makes matters difficult for the spouses.

The Law Commission at last in its seventy-first Report has recommended the introduction of matrimonial break down as a ground for divorce. Accordingly it has suggested that a separation of three years with no hopes of reconciliation should be as a proof of the break

[21] Gazette of India Extraordinary part-II: 2 p. 86 July, 1963.

down and hence a decree of divorce should be available on this ground.[22]

The Commission recommends some safeguards regarding the welfare of children, wherein it suggests that unless the court is satisfied that adequate provision for maintenance of children has been made which is consistent with financial capacity of the parties, it should not give a decree of divorce.

Yet another recommendation by the Commission is that where the wife is the respondent and there is an irretrievable break down of the marriage, the court should still have the discretion to refuse a decree if they feel that it will cause grave financial hardship to the respondent, and that in all the circumstances it would be wrong to dissolve the marriage.

It is submitted that social justice and public interest demand that irretrievable break down of marriage be a ground for divorce.

Section 13 of the Act provides several grounds for obtaining divorce by either party to the marriage whether solemnised before or after the commencement of the Act. Unless there is a custom in vogue, no divorce can be obtained by a Hindu couple without apprcaching a court of law.

The grounds common to both the Husband and wife are mentioned in Section 13 (1). They are

(a) other spouse living in adultery

[22] Kusum, 'Irretrievable break down of Marriage: Ground of Divorce', JILI Vol. 20: 2, pp. 288-299 (1978).

(b) cruelty /of the other spouse

(c) desertion by the other spouse

(d) conversiqn by the other spouse to other religion

(e) unsound mind of the other spouse

(f) virulent and incurable from of leprosy to other spouse

(g) other spouse suffering from venereal diseases

(h) renunciation of the .world by the other spouse and

(i) presumption of death of the other spouse.

To these grounds, two more grounds common to both the husband and wife were added by an amendment made in 1964,[23] in the form of Section 13 (1-A). They are:

(i) nod-resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation and

(ii) no restitution of conjugal rights as between the parties for a period of one year upwards, after passing of decree for restitution of conjugal rights. These grounds could be invoked by either the Husband or the wife for the purpose of obtaining divorce.

There are four grounds mentioned in Section 13 (2) which are available only to a wife, for the purpose of obtaining divorce. These last two grounds were added by the Marriage Laws (Amendment) Act, 1976 (68 of 1976). Even though these grounds were added in 1976, they can be availed by a wife whether her marriage was solemnized

[23] Inserted by Act 44 of 1964, Section 2.

before or after 1976. These grounds are.

In the case of any marriage solemnized before the commencement of the Act, if the husband had married again before such commencement or if such other wife was alive at the time of marriage of the petitioner, it would be an exclusive ground for the petition of such divorce. Obviously the right to apply for divorce is available only to the first wife.

Thus, in the case of a petition for divorce by the first wife on the ground that her husband had married a second wife, the fact that the husband divorced his second wife after filing the petition, is no ground to disentitle the first wife for the relief.[24]

This provision enables the wife to obtain divorce where the husband has since the solemnization of the marriage been guilty of rape, sodomy or bestiality as understood under Section 375 and 377 of the, Indian Penal Code, 1860.

Where a wife obtains a decree or order for maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of Cr. P.C., 1973 and if cohabitation between the parties had not been resumed for one year or upwards after the decree, she can invoke that non-resumption of cohabitation as a ground for obtaining divorce.

Where a Hindu girl's marriage was solemnized before she attains the age of 15 years and she repudiates the marriage after 15 years but before attaining 18 years, she can apply for divorce whether the

[24] *Naganna v. Lachmibai*, AIR 1963 AP 82: (1962) 2 An. W.R. 198.

marriage is consummated or not. In this context, the repudiation must be a valid repudiation. However certain authors are doubtful whether any repudiation of marriage done by a wife below the age of 18 years is valid because it amounts to repudiation by minor.[25]

It may be seen that similar right is given to a Muslim wife married during her minority in the form of "Khyar-ul-Bulugh" (option of Puberty).

Section 13-B of the Act, added by Act 78 of 1976 provides for divorce by mutual consent. Thus when there total break-down of the matrimonial relationship and the spouses are living separately for a period of one, year or more on the mutual agreement between the parties, divorce can be obtained from a court of law.

This provision is a progressive law as it treats the Hindu wife or equal footing with the Hindu husband.

The Act makes no provision that bars the remarriage by a divorced wife or husband, provided the divorce becomes final (Section 15). It does not attach any stigma to a Hindu woman divorcee and she is free to contract a fresh marriage.

According to Section 23-A of the Act,[26] any proceeding for divorce or judicial separation or restitution of conjugal rights may not only oppose the relief sought by the petitioner but the respondent may also make a counter claim on the grounds of petitioner's adultery, cruelty or desertion. This provision appears to be an effort to avoid filing of two petitions by the two spouses.

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[25] See Mayne's Hindu Law and Usage (13th Ed.) p. 255.
[26] Added by Section 17 of the Marriage Laws (Amendment) Act, 1976.

In any proceedings under the Act like the petition for restitution of conjugal rights, judicial separation or divorce where the respondent spouse has no independent income, sufficient for self support and also for paying the necessary expenses, the other spouse may be directed by the court to provide maintenance and legal expenses. The quantum of maintenance depends on the petitioner's own income and that of the respondent. This provision helps the spouse in financial distress to face the legal proceedings initiated by the other spouse. This provision is, only temporary and lasts till the disposal of the legal proceedings. However the maintenance awarded to a wife under Section 24 of the Act is independent and different from the proceedings under Section 125 Cr. P.C. which is a secular and social welfare provision applicable to all the religions.

The Indian Divorce Act 1869, The Parsi Marriage and Divorce Act 1936 and the Special Marriage Act 1954, provide for permanent alimony and maintenance in favour of the spouses. Section 25 of the Act makes a similar provision. Under this provision the court is empowered to grant permanent maintenance to either spouse, at the time of passing the decree or any time thereafter at the instance of a spouse who is not able to maintain himself or herself.

However, if the petition of the husband filed under the provisions of Section 9 to 14 of the Hindu Marriage Act, for a decree of restitution of conjugal rights, judicial separation for divorce is dismissed, no alimony can be granted to the wife under Section 25 of the Hindu Marriage Act. However maintenance can be claimed by her under Section 18(1) of the Hindu Adoptions and Maintenance Act or under

Section 125 Cr.PC.[27]

The award and quantum of maintenance depends on the conduct and status of the party seeking such relief. This provision is a boost to the Hindu wife who is in financial distress and not able to maintain herself during the legal proceedings.

A Hindu wife whether living with the husband or not, whether divorced or not is equally entitled to the custody of her minor children, of course subject to the satisfaction of the court by virtue of Section 26 of the Act. Even though there are no certain guidelines as to the right to custody of the minor children, the courts held that the custody of a child below 5 years of age shall be with the mother unless special circumstances injurious to the child's interest are shown.[28] Similarly the court may not be influenced by the fact of re-marriage of the mother.[29]

Thus it could be seen that in relation to the marriage and other related aspects, the Hindu Marriage Act, 1955 has introduced radical and progressive changes which go a long way in rendering gender justice. They also provide certain special rights and privileges to the Hindu woman apart from conferring equal rights on par with the Hindu men.

Apart from trying to abolish certain unequal and evil practices like polygamy, child marriage, sati and restriction on widow remarriage etc., the Modern Hindu Law has also not barred any inter-caste marriages. Thus as long as both the parties are Hindus they can get married under the provisions of the Act of 1955 irrespective of their

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[27] *Chand Dhawan v. Jawahaurlal Dhawan*, (1993) 3 SCC 406

[28] See *Radhabai v. Surendra*, AIR 1971 Mys. 69. *Chandra Prabha v. Premnath*, AIR 1969 Delhi 283.

caste.

1.3 MUSLIM WOMEN AND MARRIAGE

Islam does not distinguish between the two halves of the sphere of humanity. In order to affect perfect male-female equilibrium in the human society, the Quran speaks in numerous verses of women especially. It even promulgates a special chapter under the title "The Woman" (Surah-al-Nisa), major parts of Surah-al-Nisa deal with women and the family. Scattered over many chapters of the Quran also are special exhortations, precepts and commands concerning all stages of female life - childhood, marital life and old age.

In *Abdul Qadir v. Salima*[30] the court had to make a number of observations of which the nature of Muslim marriage received pre-eminence. Mr. Justice Mahmood, referring to *Munshi Buzlur Kuheem v. Shamsoonnisa*[31] (1867) decided by Privy Council, drawing inspiration from the Tagore Law Lecture[32] by Sarkar, and basing his support from Hamilton's Translation of Hedaya observed that 'Marriage among Muhammadans is not a sacrament, but purely a civil contract,[33] ....', with *ejab-o-kabool* as 'declaration and consent, both expressed in *preterit*,[34] and dower partaking of consideration for the connubial intercourse'[35] in gross disregard of the religious aspect of marriage, although its social aspect has not been lost sight of by him when he mentions that 'it was also instituted for the solace of life, one

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[29] *Deepankai Chatterjee v. Rupa Rao* (1989) 2 HLR 1990 (Cal).
[30] (1886) 8 All 149
[31] (1867) 11 MIA 551, 615.
[32] SC Sircar, The *Muhemmadan Law: Tagore Law Lectures,* 1874 (1975)
[33] *Baillie*
[34] Hamilton, *Hedaya*
[35] *Abdul Qadir v. Salima* (1867) 11 MIA 551, 615

of the prime or original necessities of man.[36] Mahmood, J., also set up an analogy of sale of goods with wife married to her Muslim husband in a limited sense.[37]

Subsequently, the 'purely civil contract' doctrine of Justice Mahmood came under fire in the writings of Ameer Ali, J., Abdur Rahim, J., and particularly in the judgment of Sir Sulaiman, J., of the same Allahabad High Court in context of *Ants Begum v. Tefa.* In his poignant observation, the Justice criticized the doctrine in the following terms:

> *"The line of reasoning based on the analogy of sale has naturally been very severely criticized at pages 148 and 149 in Wajid Ali Khan's case by the Oudh Bench, and so also by Mr. Ameer Ali in his Mohammadan Law, vol. II, pages 459 and 460. No doubt, the Muslim commentators have, by way of illustration, applied certain principles governing a contract of sale of goods to contract of marriage, but that was by way of analogy only The similarity cannot be pushed too far, nor can be principles governing the sale of goods applied in all their details. Indeed, if one were to pursue the analogy far enough there would be a reductic ad absurdian. The contract of the sale of goods can be cancelled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such event be returned. But if the consummation of marriage has taken place and the part of the dower remains unpaid, it would be absurd to suppose that the marriage could be cancelled by the wife at her will."*

He went on observing that:

> *"It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that marriage is not regarded as a mere civil contract, but as a religious sacrament,"*[38]

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[36] *Ibid.*
[37] *Ibid*
[38] *Anis Begum v. Muhammad Istafa (1933) 55 All 743, 756.*

The deprecation by Chief Justice Sulaiman for equating marriage with mercantile transaction and his protestation in strongest terms despite, the courts in India have till date been possessed with the 'Civil Contract' doctrine formulated by Justice Mahmood. In effect, it changed the very basis of determining legal principles in the whole gamut of Islamic matrimonial relation,[39] erroneously justifying the application of the Transfer of Property Act, Indian Contract Act, Sale of Goods. Act. the Registration Act, Specific Relief Act, so on and so forth, supplanting the relevant Islamic legal principles in its place.[40] To illustrate the point, a decision relating to dower by Mr. Justice Mitra of Calcutta High Court may be drawn to attention. On the face of the argument that dower being incidental to marriage under Muslim law and hence, calling for treatment of Muslim personal law he was of the view that:

> *"The marriage under Mohammadan Law is a Civil Contract of sale. Sale is a transfer of property for a price in contract of marriage; the wife is the property and dower is price.*[41]

Hereupon, he upheld the application of the British law palpably in defiance of objective assessment of the problem.

Marriage under Islamic law is neither a 'Samaskara' (purificatory ceremony) as in the classical Hindu law, nor a sacrament in its pristine form as among Roman Catholics.[42] It is far from the modern notion of 'non-marital cohabitation' and 'one-parent family' of the West.[43] Under

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[39] Dr. M. Shabbir, Muslim Personal Law and Judiciary (1988) 14.
[40] *Ibid.*
[41] *Suburannessa v. Sabdu Sheikh,* AIR 1934 Cal. 693:195 I.C. 422:38 CWN 747.
[42] N.R. Madhava Menon (ed) *National Convention on Uniform Civil Code for all Indians,* (1986), 83.
[43] Tahir Mahmood, *Personal Law in Islamic Countries* (1987) 268.

Islamic law, marriage is an over-emphasized and strongly enjoined *Sunnah* of the Holy Prophet to be whole-heartedly and universally exercisable by the generality of his following. The Qur'anic projection of matrimonial concept is a sacred covenant, a solemn pact, *Mithaq-i-ghalid*[44] with a pious purpose of raising a blissful family life, and having off springs in their trail. Looked at superficially, it seemingly assumes the form of ordinary contract. But an in-depth and penetrating probe bursts forth its true nature in the reflection of a highly imaginative researcher:

> *"However it is palpably wrong to say that in Islam marriage is nothing but a civil contract. In fact marriage in Islam is contractual only at the formative stage. Once a marriage is solemnized, it is much more than, and much different from a civil contract. Islam does not require a ceremonial solemnization of marriage. An intended marriage is to be proposed by or on behalf of one of the parties. This is ijab— the proposal. It is then to be accepted by or on behalf of the other party. This is qubul— acceptance. Ijab and qubul, when made in the legally prescribed manner, results into a binding marriage —a relationship of sacred partnership between the husband and wife, which the Qur'an calls a sacred covenant and a "protective fortress.*[45] *To the strict legal requirements of ijab and qubul and some procedural requirements, e.g., presence of witnesses, the Muslim society has added the extra-legal practice of recitation of the khutba-e-nikah (marriage sermon) and the finale of du'a-e-khayr (praying for the couple). These are superfluous so far as the legal theory is concerned, but have great social significance and add an aroma of solemnity to the occasion and to the newly created relationship between the two individuals and their families.*

[44] The Holy Qur'an IV: 21
[45] AA Mandudi, Huquq Al-Zawjayn (6th ed. 1968, Delhi)

> *Most certainly, thus, marriage in Islam is much more than a "contract for production of children". The contractual element in marriage is, in fact, introduced by Islam exclusively for the benefit of the parties so that they may enter into a life-partnership, as far as permissible by Shanat on their own mutually agreed terms and conditions. This element is aimed at giving greater freedom to the parties in respect of the style of their life and thus strengthens the marriage bond in its own way. In no way does it detract from the sanctity of the marriage. If properly used, it is in fact a great boon for the parties to an intended marriage.*[46]

As quality of civilization and cultural consciousness of men enhances, man's relationship with outside world registers a movement from status to contract.[47] Muslim law relating to marriage testifies this development with transition of the world from *Ahme-jahilia* (the Dark Age) to the age of enlightenment. (Early 5evcnth century A.D. which almost provides a water-shed in the World History coincides with revelation of the Holy Our'an). On objective analysis, it is not strictly a contract in the commercial sense of the term. It carries with it the major essentials and appellation of a contract. On intensive appreciation, it brings out itself to be a covenant. Offer, acceptance, *mahr,* consent of the parties, presence of witnesses, reasonable interference of the guardian, legal consequences etc.— all by way of formation of a contract—present the best form and modalities of marriage solemnization that a civilized society can contemplate of. Needless to say the Arabian society with advent of Prophet displayed all principal characteristics and vital potentialities of a great civilized[48]

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[46] Tahir Mehmood, *Personal Law in Crisis,* P.B. Gajendragadkar Endowment Lectures, Bombay University, (First Edition, 1986), 66.

[47] *Anson's, Law of Contract.*

[48] For details, P.K. Hitti, *History of Arabs;* MN Roy, *Historical role of Islam; Mohammad Qutb,* Islam the Misunderstood Religion

society, particularly considered from the contributions made and the basic socio-economic infrastructural network it laid for the emancipation of slave and women who constitute a major segment of the population. The form of marriage incidentally touches certain element of contract of commercial nature. However, the analogy, as we have seen, is by no means conclusive. Justice Mahmood with all respects to his eminent person, did not apply his mind independently while pointing out its nature He heavily banked on the observation made in the illustrious Tagore law Lecture (1873). However to substantiate his point Justice Mahmood desperately fell back upon Hamilton's Translation of the Hedaya to project *'ejab-o-kabul'* as a qualifying clement for marriage solemnization to reach out for the level of contract. Sarkar, the author of the Lecture, whose mind was consciously or unconsciously directed to the pre-Islamic Arab women on the pages of history, was allured to develop the idea as Women in that era were often subject to sale during their conjugal alliance.[49] From Mahmood J., the doctrine found its way into the later judicial decisions by the Indian courts that were ceaselessly haunted by the ghost let loose by the former. The triumph continued despite cautions pronounced by Amer All, Abdur Rahim, Sir Sulaiman JJ. and the like whose pre-eminence in Indian Judiciary was no less than Justice Mahmood's. Thus basic tenets of Islamic matrimonial jurisprudence were pushed to the background giving rise to a distorted concept in man-woman equation in matrimony. It left a disastrous impact on Muslim wives who came to be meted out a bottom-rock priority in the scheme of distribution of Justice in course of their continued degenerating process. Thus it is submitted with due respect that the

[49] Abdur Rahim, *Muhammedan Jurisprudence.*

Indian Judiciary cannot disown the share of responsibility in the downward trends of women's status in this part of the hemisphere. The relegation of matrimonial concept from the altruistic 'Sacred Covenant' to a temporal 'civil contract' has undone a lot so far as spiritual and social values are concerned. Sociological experience has revealed that irregular and random secularization within a religion-oriented society promotes process of dehumanization. Such attitude has evermore encouraged the whimsical Muslim husband to abruptly dismiss his wife without any rhyme and reason or on any pretext. It is unfortunate that multitude of Qur'anic verses seeking elevation of woman's status escaped the notice of the judicial intelligentia. Instead, woman, to their estimation, has grotesquely emerged as an object of sale.[50] And, therefore, it will not be surprising, if, to the unscrupulous Muslim husband, the reminder served by the Prophet in his Farewell Address goes unheeded:

> *'People! your wives have certain rights over you and you have certain rights over them. ... Do treat your women well and be kind to them, for they are your partners and committed helpers. Remember that you have taken them as your wives and enjoyed their flesh only under God's trust and with his permission."*[51]

Therefore, it may be observed that marriage *(nikah)* among the Muslims is a "solemn pact" (.....) between man and a woman, soliciting each other's life-companionship, which in law takes the form of a contract *(aqd).*

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[50] Regulation IV of 1793 saved the application of the Muslim Personal Law. However a purely civil contract' doctrine in *Abdul Qadir v. Salima* brought about a sweeping change in the dispensation of legal culture of India. Regulation IV of 1V of 1793 read, *Inter alia,* as follows:

> In suits regarding succession, inheritance, marriage, caste and ail religious institutions, the Mohammadan law with respect to Mohammadans — as the general rules by which die judges are to form their decisions" (Sec. 15).

[51] *Haykal, The Life of Muammad,* 486-87 (1976)

There is a popular misconception that no religious significance or social solemnity is attached to a Muslim marriage which is a "mere civil contract". However, on examination, it reveals that although it is not a sacrament in the sense that the Hindus take their marriage, Muslim marriage *(nikah)* is strictly a *sunnah* of the highest order enjoined by the Prophet himself. Even the Qur'an does not deem the marriage as an ordinary contract. In fact, it is only the form of Muslim marriage that is contractual and non-ceremonial; marriage, as a concept, is not merely a contract. Rather it is *ebadat* (service to God) and *muamlat* (social dealings).[52]

Muslim marriage is regarded as a contract between a Muslim man and woman which has for its object procreation and legitimization of children.[53] Once a marriage comes into existence, it is treated with all the essential attributes of a sacred covenant (mithag-i-ghalid). The contractual element attaches to it only at the formative stage; and there it is§ meant for the mutual benefit Office parties. A man and woman intending to become life partners can, at the very inception mutually, settle down their own terms for the entire duration of the intended partnership and in respect of all its aspects and phases. Perhaps the confusion about the Muslim marriage is compounded by the absence of a codified law in that regard and the varying practices followed by various schools.

Marriage of every Muslim, whether male or female, is permissible in law provided the following conditions are satisfied.

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[52] *Tahir Mahmood, Muslim Law of India* (1980), also Abdur Rahim, The Principles of Muhammadan Jurisprudence, Lahore (1958).

[53] D.R. Mulla, Principles of Mohammedan Law, Section 20 (Bombay, 18th Ed. 1977).

(a) Sound mind and

(b) Puberty (bulugh).

As regards puberty, it is to be understood as a physical phenomenon to be ascertained by evidence and in the absence of evidence to the contrary, it is generally presumed that a person who has completed the fifteenth year of age, has attained puberty.[54] Text book writers maintain that the earliest age of puberty for a boy is, generally twelve years and for a girl it is nine years. Thus even a minor Muslim girl also can marry if the consent of a "marriage-guardian" is obtained for that purpose.

As regards those persons (both male and female) who are neither minors nor insane, the rules of Muslim law are as follows.

(i) under all schools of Muslim law, such a boy can freely marry, personally and without any body else.

(ii) under the hanafi and Ithna Ashari Laws (but not under shafei and Ismaili school), such a girl can freely marry personally and without the consent of any one else.

As regards those people's male and female who are incompetent to contract their own marriage due to insanity or minority, the Muslim law lays down as under.

(i) under none of the schools of Muslim law, can an insane person (male or female) or a minor contract a marriage without the consent and intervention of his or her "marriage-guardian".

[54] *Mt. Aliqa Begum v. Ibrahim*, AIR 1916 PC 250, as quoted in Tahir Mahmood: the Muslim Law of India (1980) at p. 49.

(ii) under Shafei law a girl, though not a minor or insane, cannot contract her first marriage without the consent of her marriage-guardian; but where she is marrying for the first time, this rule does not apply. The same principle applies to Ismaili Law.

Thus it could be seen that there is no uniform practice as to the marriage of a Muslim either male or female even though he or she is a major and of sound mind. It depends on the school to which the person belongs to.

The authority of a person to contract the marriage of another who is incompetent to contract his or her own marriage is called "marriage-guardianship" (Witlyat-e-nikah). The person having such authority is called marriage-guardian (Wali-e-nikah). Only those persons who can contract their own marriage can act as marriage guardian for another person.

There is no uniformity as to the persons who can act as marriage-guardians. Different Schools of Muslim law follow different practices in this regard. Eg: In Hanafi law, there are 18 relatives of the bride/bride groom who can act as "marriage-guardians" they include father, father's father, father's father's father, brother (first full, then consanguineous) etc., one after the other. At the shafei, Ithna Ashari, and Ismali laws, the entitlement to marriage-guardianship is extremely restricted. Only the father, or the father's father of a minor can act as the marriage guardian.

However, there is no "Kanyadan" or the "ceremonial giving" of the bride in marriage, as the guardian in marriage acts only as a mediator.

(iii) The Indian Majority Act, 1875 does not affect the roles of Muslim law relating, to minor's marriage.[55]

However, the rules of Muslim law relating to minor's marriage do conflict with the provisions of the Child Marriage Restraint Act, 1929 (Popularly known as Sarada Act) which is applicable equally to all Indians including Muslims. Under the provisions of this Act, every man below the age of 21 years, as also every girl below the age of 18 years is a "Child", every person under the age of 18 years is a "minor" and every marriage either party to which is a child is a "child marriage". As Muslims do not enjoy an exemption from any of the aforesaid provisions of the Act of 1929, when a Muslim marriage is a "child marriage" under the Act takes place, various persons responsible for it including the bride groom not being a "child", the "marriage-guardian", if any may be prosecuted. However there is nothing in the Art which suggests that a marriage in violation of its provisions will be invalid.

(iv) As a Muslim marriage partakes the character of 'Civil Contract', there is always a proposal (*Ijab*) by either party or acceptance (*Qubul*) by the other party. If the parties to the intending marriage are not competent to contract their own marriage then the proposal and acceptance can be made by their respective marriage guardians. The proposal and acceptance can be made either personally, or through a representative. Most of the Muslim schools like Hanafi and Shafei insist on the presence of witnesses (Gawah) when the contract takes place.

(v) In Pre-Islamic Arabia, unlimited polygamy was prevailing. After

[55] See Section 2(a) of the Act, 1875, which specifically states that the Act shall not affect the marriage, dower, divorce or adoption of any person governed by personal laws.

the advent of Islam, the prophet introduced limited polygamy which fixed the limit of four wives. A Mohammedan male may have four wives at the same time. However it may be remembered that it is only a permission given by the Holy Quran to contract a polygamous marriage and it is not a compulsion. A Muslim male can marry more than one woman subject to a maximum of four, only when he can deal with them justly and equitably.

Though limited polygamy has been recognized by Islam, it is -tolerated only under certain, circumstances. In the case of *Moonshee Byzloor Raheem v. Shamsonnisa Begum*,[56] the Privy Council observed:

> *"Mohammedan law enforced in India has considered polygamy as an institution to be tolerated but not encouraged and has not enforced upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances"*

Now after passing of the Dissolution of Muslim Marriage Act, 1939, a Mohammedan wife can file a suit for divorce against the husband, on the ground that her husband, having more than one wife, is not treating her equitably.[57]

If a Muslim male contracts a fifth marriage when his first four marriages are intact, such marriage is void (*Batil*) as per Shia law but is only irregular (*Fasid*) as per the Sunni law.

(vi) A Muslim woman is not allowed to have at a time more than one husband. If she marries again during the life-time of her husband, she will be guilty of committing the offence of Bigamy under Section 494 of Indian Penal Code. The children born to bigamous

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[56] 11 MIA 551.
[57] *Zubaida Begum v. Sardar Shah*, AIR 1943 Lah. 310.

marriages are illegitimate.

(vii) There are three kinds of prohibitions of impediments to a Muslim marriage.

(1) A marriage between two Muslims is absolutely prohibited.

(i) on the ground of polyandry of the woman.

(ii) the ground of consanguinity (blood relationship)

(iii) on the ground of affinity (through earlier marriage) and

(iv) on the ground of fosterage,. .

A marriage performed or contracted disregarding these impediments are void (*Batil*) and it does not give rise to any marital rights or obligations.

(2) A marriage between two Muslims is not absolutely prohibited:

(i) on the ground of unlawful conjunction

(ii) on the ground of polygamy

(iii) on the ground *Iddat* period

(iv) on the ground Difference of Religion

(v) on the ground absence of witnesses and

(vi) on the ground of Divorce (where the divorced female is sought to be remarried by the husband).

Thus in the case of unlawful conjunction i.e. where a Mohammedan male of Sunni is prohibited to marry at the same time two wives who are so related each other by blood relationship, affinity or fosterage

that if one of them were a male they could have been lawfully married if the husband divorces one, the marriage with the other is valid.

Similarly a Mohammedan male is prohibited to marry a woman who is undergoing "*Iddat*" period after the dissolution of her first/earlier marriage. Here the "*iddat* period" varies depending on the cause of dissolution viz. death of husband or divorce etc. A Mohammedan female is prohibited to marry a non-Mohammedan. These impediments are only temporary and can be removed by a subsequent supervening development like divorcing one of the wives, expiry of *iddat* period and conversion to Islam etc. Any Muslim marriage contracted ignoring these impediments are irregular (*Fasid*) which can be regularized by certain actions or developments.

(viii) A Muslim wife is also entitled to dower (*mahr*) from her husband. Dower or *mahr* is a sum of money or other property which the wife is entitled to receive from the husband in "*consideration of marriage*".[58] It is inherent in the concept of marriage under Mohammedan law. It is a sort of deterrented to the husband's absolute power of pronouncing divorce on his wife, so the main object of dower is to offer protection to wife against such arbitrary power.[59] However some of the Mohammedan Law commentators do not agree with the idea of identifying *mahr* as consideration for marriage, but they consider it as an obligation imposed upon a husband as mark of respect for the wife.[60]

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[58] Mulla, Principles of Mohemmedan Law, 17th Ed. p. 277
[59] *Abdur Kadir v. Salima* ILR 8 All. 149.
[60] Abdur Rahim, "*Mohemmedan Jurisprudence*" p. 334.

The Dower may be Prompt Dower which is payable at the time of marriage or Deferred Dower which may be paid at the time of death of the husband or on the dissolution of marriage. The Quantum of dower depends on the status of the husband and wife.

(ix) In Muslim Law, the Shia law recognizes *'muta'* marriages but according to Sunni law, such marriages are void.[61] Among the Shias also the "Ithna ashari School" only permits such marriages.

The literal meaning of the word *'muta'* is enjoyment, use. Thus a *muta* marriage is a contract marriage for a certain period of time as agreed by the parties.

A Mohammedan male of Ithna Ashari sect of the Shias may contract any number of *muta* marriages, with a female belonging to Islam, Christianity, or Jewish religion. However a female of Ithna Ashari sect of the Shias has capacity to contract a valid *muta* marriage only with a Mohammedan and nobody else of other religion. A major Shia female of Ithna ashari School has capacity to contract a valid *muta* marriage without the consent of her guardian but if she is a minor, she can do so only with the consent of her guardian. The violation of this condition by a minor girl will render the marriage unlawful.

In a *Muta* Marriage, the period of cohabitation and the amount of dower must be specified. The condition of proposal and acceptance should be fulfilled along with the use of the word *'tazwig'* or *'nikah'* or *'muta'*.

[61] Baillie, I, 18; The Hedaya, 33.

(x) The following are the consequences of a valid *muta* marriage.

(1) The parties to a *muta* marriage will be called the *muta* husband and the *muta* wife.

(2) A *muta* marriage does not give rise to mutual rights of inheritance between the rights to inheritance between the *muta* husband and the *muta* wife. However this practice -can be over-ridden by an agreement to the contrary.

(3) A *muta* wife is not entitled to any maintenance from the husband.

(4) In a *muta* marriage, the children born out of this union are legitimate and capable of inheriting from both the parents in the same manner as the off springs of a permanent marriage.

(5) If the *muta* marriage is dissolved by the death of the husband, the *muta* widow must observe the period of *iddat* for 4 months and 10 days or till the delivery in the case of pregnancy and.

(6) Dower *or mahr* must, be specified in a *muta* marriage.

Thus the status of a *muta* wife is very low and insecure, as compared to that of a Muslim wife in a permanent marriage.

On the basis of above discussion amply makes it clear that in a Muslim marriage, the female plays an important and almost an equal role as compared to the males. However she enjoys a very fragile marital life as the Muslim husband is vested with an almost absolute right to divorce the wife at any time by resorting to Triple Talaq' method. It is not to say that every Muslim husband is invoking his

right to divorce his wife indiscriminately but only to point out the possibility of its misuse. The law relating to Divorce among Muslims and the position of the Muslim wife papoose to it, has been discussed in detail elsewhere in this work.

1.4 CHRISTIAN WOMEN AND MARRIAGE

English Law from the very beginning subscribed to the notion of spousal consent to the marriage. The ecclesiastical was of the view that though in its formation marriage was a contract, it was a sacrament in its consequence. With the advent of Reformation, the Protestant World came out with the notion that marriage was a civil contract and matrimonial matters were subject to the jurisdiction of civil courts, ecclesiastical court having no jurisdiction over them. The marriage thereafter also came to be regarded as a dissoluble union. Thus the Reformation caused a fundamental change of attitude towards marriage among the Protestants, The Catholics continued to uphold and follow the ecclesiastical doctrinaire view of sacra-mentality and indissolubility of marriage, while the Protestants became liberated and propounded the concept of contractually and dissolubility of marriage. They regarded marriage as essentially man-made in sharp contrast to the Catholic view that marriage was made in heaven.[62]

Still, the Protestant though regarded their marriage as contract, regarded it as a special contract. It was not equated with commercial contract. They asserted that marriage being a social institution, there was social interest in its preservation and protection.

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[62] Friedman, *law in a Changing Society* (1970), 174; also A.A. Maududi (Supra note, 24) who has attributed this changed view of the protestant to the interaction of Christianity with the Islamic East on the Reformation eve.

Among the Indian Christians, marriage is regarded as a civil contract, though it is usually solemnized by a Minister of religion licensed under the Christian Marriage Act, 1872. It can also be solemnized by Registrar of Marriages.[63]

Every marriage between Indian Christians may be solemnized provided the bride is 18 years of age and the bride groom 21 years. Polygamy is prohibited among the Christians. For the contract of marriage among Christians, the free and intelligent consent of the parties is indispensable. As the Christian do not have a personal law, the law of marriage with special exceptions is codified in the Indian Christian Marriage Act, and Indian Divorce Act.

There are number of enactments in India that deal with the Christian marriages and matrimonial causes. They are the Indian Christian Marriage Act, 1872, the Marriage's Validation Act, 1892,

The Cochin Christian Civil Marriage Act, 1905, The Indian Matrimonial causes (War Marriages) Act," 1948. The convert's Marriage Dissolution Act, 1866 and The Indian Divorce Act, 1869 etc. However many lawyers and jurists are of the opinion that the law relating to Christian marriage is deficient and that it lacks coherency.

The Indian Christian Marriage Act, 1872 deals with a Christian marriage in India. This Act lays down various provisions dealing with the marriage registrar, time and place of marriage registration of marriages and the grant of marriage certificates etc. A perusal of various legislations on the topic makes it amply clear that a Christian marriage has the right to maintenances during marriage to restitution

[63] Section 4 of the Christian Marriage Act, 1872.

of conjugal rights, to judicial separation and divorce. Every Christian marriage may be solemnized by complying with certain preliminary procedural formalities like notices of the intended marriage, publication of such notice and declaration by one of the parties. Registration such marriage is compulsory. A marriage between the Indian Christians may be solemnized without the preliminary procedural formalities of notice etc. by any person licensed to solemnize such marriages.

The Christian women enjoy equal rights in her marital life along with her husband. There is no polygamy permitted among the Christians similarly to Christians cannot marry each other, if they are within the prohibited degrees of relationships. The Child Marriage Restraint Act, 1929 is applicable to the Christian also. It is clear that a Christian wife enjoys co-equal rights with Hindu and Muslim wife even though her status and rights are not governed by a single law.

1.5 PARSI WOMEN AND MARRIAGE

Among the Parsis, marriage, as it stands now, is regarded as a contract. In Parsi marriage though a religious ceremony called *ashirbad*[64] is mandatory for its validity, it is essentially regarded as contract. Consent is essential in marriage. A Parsi priest solemnizes the marriage amid ceremony *of ashirbad* in the presence of two witnesses. *Ashirbad* is a prayer or exhortation to the parties for observance of their marital obligations.[65]

It is notable, therefore, that a Hindu husband takes wife in the presence

[64] Hastings, J. (ed.) *Encyclopedia of Religion and Ethics,* Vol.-VII, Fourth impression 1958 pp. 455-456; also Karaka, Dosabhai Framji, *History of the Parsis,* vol. I, 1884 edn. p. 178.
[65] Section 3(b) of the Parsi Marriage and Divorce Act, 1936

of consecrated fire, a Muslim husband takes her under God's trust and with His permission, a Christian husband unites with his wife with all holiness of the Church and a Parsi husband takes wife in the presence of a priest under a solemn vow. While under Hindu and Christian system of marriage, the bond between husband and wife are sought to be strengthened through a concept of sacrament, under Islamic marriage the same object 15 sought to be achieved by declaring marriage as *Sunnah* of highest order ordained by the Prophet and as *ibadat* i.e. service to God and devotional act.

A marriage under the Parsi Marriage and Divorce Act, 1936 is nullity, if (1) the parties are within the prohibited degrees of consanguinity or affinity (Section 3), (2) necessary formalities of marriage are not performed (Section 3), (3) party/parties to marriage is/are less than 21 years and the marriage solemnized without guardian's consent (Section 30), and (4) either party was impotent (Section 30).

Section 34 of the Parsi Marriage and Divorce Act, 1936 which contains the provision runs as follows:

> *Any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce, or on the ground that the defendant has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it in the judgment of the court improper to compel him or her to live with defendant.*

It may be observed that the provisions of the Hindu Marriage Act and the Special Marriage Act are more or less comprehensive; the provisions under the Indian Divorce Act are most inadequate. The grounds provided under the Parsi law leave room for rationalization as

the Act has incorporated certain grounds which should normally have been grounds for nullity. In addition to those nine grounds, Hindu Marriage Act, 1955 incorporates a few more additional grounds for wife alone.[66]

Section 36 of the Parsi Marriage and Divorce Act, 1936 also delineates the circumstances in which a suit for conjugal rights can be lodged. Section 38 of the Act says that no suit is to be filed to enforce marriage or contract arising thereof in those cases where the husband is below sixteen years or the wife below fourteen. According to Section 15 of the Act, the provision of the Code of Civil Procedure, 1908 shall so far as the same may be applicable, apply to proceedings in suits instituted under this Act including proceedings in execution and orders subsequent to a decree.

Section 36 of the Act says where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

The words of this Section are same as used in Section 32 of the Indian Divorce Act with this difference that the expression used there is "without reasonable cause" whereas it is "ceasing to cohabit without lawful or just cause". The two expressions, says histice S.C.

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[66] Sampath, 'Uniform Civil Code: Judicial separation and Divorce', *National Convention on Univirm Civil Code for all Indians* (1988), New Delhi

Manchanda, mean the same thing.[67] Therefore, for the correct interpretation of these words reference may be made to the Section 32 of the Indian Divorce Act. The question as to what would be a lawful or just cause, among the Parsis, for a refusal to cohabit, is one of fact to be decided by the delegates. In *Hirabai v. Dhanjibai*[68] it was held that the grounds for refusal to cohabit must be grave and weighty so as to make the due performance of the marital obligation a moral impossibility.

A defence to restitution petition under Parsi law is the same as under Section 33 of the Indian Divorce Act. It was held in *Kawasji v. Sirinbai*[69] that an agreement to live separate is as good a defence to a suit for restitution among the Parsis as it is under the Indian Divorce Act.

It is observed that Act of 1936 deletes the penal clause which existed in Section 36 of the Act of 1865. Under the Act, 1865 a failure to obey a decree for restitution rendered the defaulting party liable to imprisonment for a term which right extend to one month or with fine or with both.[70] But under the Act, 1936 a decree for restitution is enforceable only in the manner provided for in the Code of Civil Procedure. Apart from this remedy, the plaintiff has been conferred a statutory right lo apply for a divorce on tlie ground of refusal to comply with a decree for a year.

The object of the Section 37 is to avoid multiplicity of suit between the same parties. This Section provides that the respondent need not file a

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[67] SC Manchanda, *The Law and Practice of Divorce* (4th ed.) 1973
[68] (1900) 2 Bom. LR 845
[69] 23 Bom. 279.
[70] *Ardesar v. Arabai,* 9 Bom. H. C. Rep. (ACJ) 290.

separate suit in order to obtain relief. It is enough for him or her to counter-charge in his or her answer to the petition and the court will then grant him such relief to which he is entitled as if he or she had prescnted a cross-petition. In this respect it differs essentially from Section 15 of the Indian Divorce Act which provides relief to the respondent in case of opposition on certain specific ground only. This Section therefore has the merit of completely avoiding multiplicity of suits and the defendant need never file a separate petidon for any relief under the Act that he may desire to obtain.

It may be submitted that the restitution of conjugal rights as a matrimonial remedy under Section 36 of the Parsi Marriage and Divorce Act, 1936 has never been tesled on the constitutional touch-stone of the judiciary as was done with respect to the remedy under Section 9 of the Hindu Marriage Act, 1955.[71] And issues involving the restitution of conjugal rights incorporated under Parsi law does not materially differ from those under Hindu law which was framed in the backdrop of similar social facts so far as women's interests are concerned. As already stated Parsi community like Christians forms an infinitesimal fraction of our populace.

[71] Dr. M. Shabbir, *Parsi Law in India* (1991).

Chapter-2:
Dissolution of Marriage

Chapter-2

DISSOLUTION OF MARRIAGE

2.1 INTRODUCTORY REMARKS

The Union of marriage is never meant to be broken under any personal law. Firm union of the husband and wife is a necessary condition for a happy family-life. Islam therefore, insists upon the subsistence of marriage and prescribes that breach of the marriage-contract should be avoided. Initially no marriage is contracted to be dissolved in future, but in unfortunate cases the dissolution takes place and the matrimonial contract is broken. A marriage may be dissolved:

(1) by act of God i.e. due to death of the husband or wife, or

(2) by act of the parties i.e. divorce

Death of the husband or wife during subsistence of marriage dissolves the marriage immediately under all the personal law systems. The very fact of the death of any party to the marriage is sufficient to terminate the marriage. Where a Marriage is terminated by act of the parties, the dissolution is called divorce. Under Muslim law the divorce may take place by the act of parties themselves or through a decree of the court of law. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst.[1] Divorce being an evil, it must be avoided as far as possible. But sometimes this evil becomes a necessity. When it is impossible for the parties to carry on their union

[1] See Tyabji; Muslim Law; Fourth Edn. p. 143.

with mutual love and affection, it is better to allow them to be separated instead of compelling them to live together in an atmosphere of hatred and sufferings. The basis of the Islamic law of divorce is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. It may be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce.

The Indian Divorce Act, 1869 regulates the law relating to the divorce of persons professing the Christian religion and also the other matrimonial clauses. This act has application if one of the parties to the proceedings is a Christian. The Act is modeled on the English law of divorce (Section 7) Section 10 of the act provides the grounds on which a husband or a wife may petition for dissolution of marriage. It has prescribed a solitary ground for dissolution of marriage on a petition by a husband that is adultery of the wife. It is not necessary that there should be direct evidence of adultery before marriage can be dissolved, for direct evidence is rarely available. Association coupled with opportunity and evidence of illicit affection or familiarity may be sufficient for the court.

2.2 MUSLIM WOMEN- DISSOLUTION OF MARRIAGE

(a) Divorce by husband

Among the pre-Islamic Arab, the power of divorce possessed by the husband was unlimited. They could divorce their wife at any time, for any reason or without reason. They could also revoke their divorce, and divorce again as many times as they preferred. They could, if they were so inclined, swear that they would have no intercourse with their

wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.[2]

According to Abdur Rahim, at least four various types of dissolution of marriage were known in the pre-Islamic Arabia. These were *talaq, ila, Zihar, Khula.* A woman, if absolutely separated through any of these four modes, was probably free to re-marry. But she could not do so until sometime, called the period *of iddat,* had passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that the period of *iddat* in case of death of husband then was one year.

The Prophet of Islam looked upon these customs of divorce with extreme disapproval, and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions He permitted to divorced parties three distinct and separate periods within which they might endeavour to become reconciled, but should all attempts of reconciliation prove unsuccessful then in the third period the final separation became effective.[3]

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[2] Ibrahim Abdul Hamid, "Dissolution of Marriage" in Islamic Quarterly, 3(1956) 166-75, 215-223:4 (1957) 3-10, 57-65, 97-113.
[3] Ameer Ali, *The Spirit of Islam,* (London 1965), pp. 243-44.

The reforms of the Holy Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband, and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced "*talaq* to be the most detestable before God of all permitted things",[4] for it prevented conjugal happiness and interfered with the proper upbringing of children.

Ameer Ali asserts:

> *"The permission (of divorce), therefore, in the Koran though it gave a certain countenance to the old customs, had to be read in the light of the Law giver's own enunciation? When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce*[5].

The effective check placed by Islam on frequent divorce and remarriage was that incase of irrevocable separation, it is essential for remarriage, that the wife should marry another man, and this marriage be consummated before divorce, and the wife should observe *iddat.* This was a measure which rendered separation more rare. Certain critics accuse this procedure as "a disgusting ordeal" and "revolting", but they ignore that among a proud, jealous, and sensitive race like the Arabs, such a condition was one of the strongest antidotes for the evil. It intended to control one of the most sensitive nations of the earth, by acting on the strongest feeling of their nature, the sense of honour.[6]

It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without

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[4] Abu Daud, Sunan, xiii 3.
[5] *Supra note,* 17.

cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband's withholding divorce than by this irresponsible exercise of the right.[7]

It is true that the divorce does him at the root of many sufferings, but it is to be borne in mind that the husband's right to divorce is in fact circumscribed in various ways. The amount of dower itself serves as "a check on the capricious exercise of his unlimited power of divorce".[8] The higher the amount of dower, the more difficult is the pronouncement of *talaq*. Then *talaq tafweed* (divorce by delegation) is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court".[9] The wife may at the time of entering into a marriage contract to secure the right of divorce from the husband.

"One cannot deny that many Muslim men abuse the matrimonial laws of Islam and treat their women shabbily. But it certainly does not mean that Muslim women live inconstant dread of the blighted word - *talaq, talaq, talaq* as some self-appointed experts on Shariat... would have us believe", observes Parwez Hafeez. According to him, Muslim men despise divorce as much as Muslim women. Divorce is considered a dirty word and is strongly disapproved of even in Muslim society. Because of the social stigma attached to it, the overwhelming majority of Muslim men never dream of uttering the word. The rate of divorce among Indian Muslim is more or less the same as among other communities. In the Western society, where divorce is a time-

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[6] Id. at pp. 245 & 46
[7] Id. at pp. 245 & 46
[8] Fyzee, "TheMuslim Wife's Right of dissolving her Marriage". (1936) 38 Bom. Law Reporter, LJ 113.
[9] Id. at 159.

consuming, expensive and torturous process, the divorce rate in some countries is as high as 45 percent. Bertrand Russel, much-married and much-divorced, observes the author, acknowledged that *where family feeling is strong, the rate of divorce is low even if it is legally easy and conversely where family feeling is weak, rate of divorce is high even if it is legally difficult. It need not be mentioned (hat family ties are extraordinarily strong in Muslim society.* The "rational, realistic and modern law of Islamic divorce" appears repugnant to many because of their mind-set that divorce is something inherently immoral. But social scientists and marriage counsellor agree that it is a better and healthier for a constantly squabbling couple to part than to persist with a marriage that becomes a mere sham. When a matrimonial alliance turns into a prison sentence, making life an unending nightmare for both or either of the spouses, divorce is the only escape-route to relief, liberty and sanity. Other societies realized this reality only in the current century while law-givers of Islam realized it fourteen centuries ago.[10]

The legal systems of various countries have grudgingly accepted the truth that if the marriage has broken down irretrievably let there be a divorce. Called the "breakdown theory", this law was incorporated by British in 1969 and recommended by the Indian Law Commission in its report in 1978.

Besides these precautionary devices, Islamic law has given rights to the wife to get rid of an unpleasant husband and has the marriage dissolved through the prescribed procedure on certain grounds.[11] The

[10] Parwez Hafeez, "Talaq is as dirty a word for Muslim men as it is for women". The Asian Age, 23 August, 1995.
[11] Fyzee, *Outlines of Muhammedan Laws* (4th ed.) p. 33

law also protects the wife against the malicious intent of the husband in pronouncing *talaq.* This situation is well-explained by Mulla who says that the rights of mutual inheritance cease immediately when the *talaq* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry *iddat.* To this there is an exception in favour of the wife. It *is* this that if the repudiation was made during the husband's death- "illness (marz-al-maul), and he dies, before the expiry of the *iddat* the wife is entitled to inherit from him, the reason being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance.[12]

Lastly, the inequality of sexes is explained by Abdur Rahim in these words:

> *"The relations between two members of the opposite sexes which marriage legalizes are, however, so subtle and delicate and require such constant adjustment, involving the fate and well-being of the future generations, that in their regulation, the law considers it expedient to allow the voice of one partner more or less predominant over that of the other".*[13]

The structure of the Islamic law of divorce is, as already stated, based on the so-called "breakdown theory", now being adopted by modern laws on matrimonial disputes. Without prescribing any specific "grounds" for divorce, it allows dissolution of marriages at the instance of husband *(by talaq) or* the wife *(by Khul)* and by mutual consent (by *mubara'at)* subject in each case, to such ifs and buts that in modern legal terminology can be best translated into nothing but "irretrievable break down".[14]

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[12] Mulla, DF, *Principles of Mohammedan Law* (ed. 16th) S. 335.
[13] Abdur Rahim, *Muhammedan Jurisprudence,* 19, p. 327.
[14] Tahir Mahmood, *"Halala: A misunderstood concept of Muslim Law". 11 NO. 4 Islamic &*

The Prophet who set the examples by never divorcing any of his wives despite occasional provocation inspired religious awe against divorce by declaring that "among legally permitted things most detestable in God's sight is divorce". The Qur'an prescribed bilateral reconciliatory measures to precede essentially every case of divorce.[15] Only where marital relationship was ruptured past all repairs, room was kept for a respectable parting of ways. Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but is a necessary evil. It is better to wreck the unity of the family than to wreck the future happiness of the parties by binding them to a companionship that has become odious.[16]

Thus it may be submitted that Islam discourages divorce in principle and permits it only when it becomes absolutely impossible for the parties to live in peace and harmony. The Prophet has expressed his abhorrence of it on various occasions.[17] Unequivocally declaring divorce to be *abghad al-mubahat* (i.e. most detestable of all legally permissible things) the Prophet issued a stern warning:

> *"Enter into marriage and do not dissolve it. God hates those men and women who change their bed-partners for sake of pleasure".*[18]

Another tradition says: "Marry but do not divorce, because God does not like men and women who relish variety of sexual pleasure." He also warned, 'Do not make *nikah* and *talaq* a play thing'. Elsewhere he said, 'Marry not for the sake of divorce'. In case of differences and

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Comparative Law Quarterly, December 1982, p. 299.
[15] Qu'an, IV: 35.
[16] Fyzee, *Outlines of Muhammedan Law* (4th ed.) p. 148.
[17] Mohammad Ali, Manual Hadith, 284.
[18] Abu Da'ud, Mishkat (Kitab al talaq) as cited in the Jami Saghir (Egyptian ed.)

family jars which may lead to divorce, Qur 'an enjoins four steps to be in that order: (1) perhaps verbal advice or admonition may be sufficient; (2) if not, sex relations may be suspended; (3) if this is not sufficient, some light physical correction may be administered; but Imam Shaft considers this inadvisable, though permissible and all authorities are unanimous in deprecating any sort of cruelty, even of the nagging kind; (4) if all this fails, a family council is recommended:

> *As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first), (Next), refuse to share their bed (And last) beat them (lightly); But if they return to obedience. Seek not against them.*
>
> *Means (of annoyance): For God is Most High, Great (above you all).*
>
> *35. If ye fear a breach Between them twain, appoint (two) arbiters. One from his family and the other from hers; If they wish for peace.*
>
> *God will cause their reconciliation: For God hath full knowledge. And is acquainted with all things.*[19]

It may be submitted that this is an excellent plan for settling family disputes without too much publicity or mud-throwing or resort to the chicaneries of the law. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncrasies of both parties and would be able, with God's help to effect a real reconciliation.[20]

It has also been observed that these three measures are not to be applied to simultaneously or equally in every case. The punishment shall correspond to the fault and the status of the wife. Where a light

[19] The Holy Qur'an. IV: 34-35.

admonishment proves effective, sterner measures shall not be resorted to, as for the third harsher alternative in case of an incorrigible wife. The Prophet directs men not to hit across the face, nor to beat severely nor use anything that might leave marks on the body *(Ibn Majah).* And the Prophet elaborates in the most unambiguous terms that husbands who resort to such measures are not among the best. Again it must be borne in mind that this permission to rectify an errant wife is just symbolic and by way of a warning.[21]

The Qur'anic injunction apart, there is also a tradition of the Prophet suggesting reconciliation:

> *"... Let the case be referred to two Muslim arbitrators, free and just, one chosen from the family of each of the parties; and they shall see, whether in that particular case reconciliation or separation is desirable; and their decision shall be binding upon them both.*[22]

Though Islam recognizes the necessity for divorce in cases when marital relations have been poisoned to a degree which makes a peaceful home life impossible, it does not believe in unlimited opportunities for divorce on frivolous and unimportant grounds, because any undue increase in the facilities of divorce would destroy the stability of family life. Therefore, while allowing divorce on genuine grounds, Islam has taken great care to introduce checks and balances designed to limit the use of available facilities. Let us see in more detail the Islamic law on this point.

So far as men are concerned, they have been given liberty of divorce on certain conditions. First, as regards the dower they bestowed on

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[20] Abdullah Yusuf Ali, *The Holy Qur'an (vol. I)* New Delhi, (1982)
[21] Syed Yusuf, *'Talaw: a few home truths', The Asian Age,* 25th September 1995.

their wives, they are not permitted to withhold it or take back anything from it, if they decide upon divorce. Secondly, a divorce pronounced at a single sitting does not have the effect of final separation. It *is* laid down as a condition that a divorce, to take legal effect, must be pronounced three times at an interval of one month each. There is some difference of opinion as to whether three pronouncements at a single sitting can have the effect of final separation. Most jurists hold that for a divorce to take effect, it is pronounced three times even at a single sitting. But Imam Ahmad ibn Hanbal and Ibn Taymiyyah reject this opinion and regard three declarations of divorce delivered at a single sitting as one pronouncement, so that separation does not come at the end of three such declarations, but only when such declarations are separately made at an interval of one month. There are strong grounds for supporting the stand taken by Imam Ahmad and Imam Ibn Taymiyyah.[23] In the first place it is obvious that the intention of the law m prescribing three pronouncements of divorce separated by fixed intervals of time precedent to final separation was to leave open the opportunity of reconciliation. This intension is defeated by recognition of three pronouncements delivered at a single sitting with the effect of final separation. Secondly, there is evidence to show that the companions of the Prophet regarded this form of divorce as being morally reprehensible and involving the person responsible in a great religious sin. It is recorded that 'Umar, the second caliph, used to punish such persons who pronounced three divorces at a single sitting. Ibn Abbas, another companion of the Prophet was asked about a person who divorced his wife in a single sitting. He said: 'Man was

[22] Ahmad Galwash, *The Religion of Islam,* Cairo (1945) p. 135.
[23] Ashraf Ali Thanavi, *IV Behisti Zewar,* (Volume on Marriage and Divorce) 29: 13.

guilty of disobedience to divine commands'. 'Ali is reported to have said: 'If the people faithfully observed the conditions of divorce, no one would feel sorry for the separation of his wife'. In the face of this strong evidence, it is strange that the majority of the jurists recognized the legal validity of an act which has been universally condemned as being highly sinful and which obviously defeat the law giver's intention.

During the period of the first two pronouncements of divorce, the husband and the wife are required to live together as formerly, so that if the husband has acted hurriedly or in a fit of passion, he may revoke his pronouncement and normal relations may be restored. Again if the husband has sexual intercourse with his wife or indulges in the preliminaries of co-habitation, the pronouncement of divorce lapses automatically without express declaration on his part. If, however, no such thing has happened and two intervals of one month each has elapsed, and the husband makes the third and final pronouncement after this period, marital relations are completely dissolved and the divorce is complete. If the husband reports after this and wishes to have his wife again, he cannot do so, except after his wife has been married to someone else and divorced by him too. This provision has been considered necessary in order that it may act as a deterrent for husbands who are prone to act rashly without considering the consequences of their action.[24] According to one submission 'this was deterrent law meant to prevent the husband from divorcing his wife for a third time, whenever it be in his life,... . It was a pro-woman law of a permissive nature.[25]

[24] MM Siddiqui, *Women in Islam* (1980), 64.
[25] Tahir Mohmood, *II Islamic & Comparative Law quarterly,* p. 301.

Talaqul biddat triple declaration or a single declaration, observes Mulla,[26] "is good in law, though bad in theology". Tyabji points out it has become most common, for men have always moulded the law of marriage so as to be the most agreeable to themselves.[27] Though it is common use, it may be submitted, the present trend of opinion all over the Islamic world is against it. Pakistan has abolished it.[28] There it has been given in writing with a prior notice of three months. *Talaq* is effective only with the permission of the union council constituted by the government. Similarly in Sudan, Jordon, Syria and Morocco, it is provided that the triple divorce when pronounced in a single formula or on one and the same occasion, would count as a single and revocable divorce.

Similarly, in divorcing one's wife regard is shown for the better considered judgment. One might ask: why should the *lalaq* be effective even if it is pronounced under compulsion or in a state of voluntary intoxication,[29] in jest or in anger? *Talaq* under intoxication is peculiar to *Hanafi* law alone, and has been criticized as absurd and hence unjust and should be abolished by statute.[30] Ameer Ali and Abdur Rahim suggest that in such cases where the parties happen to be *Hanafi,* the court should on grounds of equity, apply the *Shafei* law. The Ottoman law of Family Rights also provides that *talaq* uttered under the influence of intoxication or intimidation would no longer be given effect to. The legislations introduced in Jordan and Syria provide that the formula of *talaq* uttered as an oath or threat would be carried into effect only if the husband really so intended. It may be observed

[26] Mulla S. 311.
[27] Tyabjee, *Muhammadan Law* (3rd ed) 221.
[28] Section 66, government of Pakistan, Ministry of Law, Ordinance no. viii of 1961.
[29] A.A.A. Fyzee, *Outlines of Muhammedan Law* (4th ed.) p. 156.

in this connection that *Talaq-ul-biddat* came into being during the second century of Islam when the Umayyid monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found a loophole to effect their purpose.[31]

Thus it is abundantly clear that it was not Islam but Omayyid practices that gave validity to these *biddat* divorces. It has recently been pointed out by Justice Iyer in *Yusuf v. Sowramma*[32] where he said:

> *"It is a popular fallacy that a Muslim male enjoys under the Qur'anic law, unbridled authority to liquidate the marriage... the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy Qur'an laid down and the same misconception vitiates the law dealing with the wife's rights to divorce.... Commentators on the Qur'an have rightly observed and these tallies with the law now administered in some Muslim countries like Iraq that the husband must satisfy the court about the reasons for divorce".*

Talaq-ul-biddat should, therefore, be not given effect to Abdur Rahim[33] is more poignant when he says:

> *"I may remark that the interpretation of the law of divorce by the jurists specially of the Hanafi School, is one flagrant instance where because of liberal adherence to mere words and a certain tendency towards subtleties they have reached a result in direct*

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[30] Ibid (4th ed.) p. 156.
[31] Khalid Rashid, *Muslim Law* (1976) pp. 96-97
[32] AIR 1971 Ker. 261
[33] M.R. Zafer, *"Unilateal Divorce I nMuslim Personal Law"*, in Islamic Law in Modern India (1972) p. 173

antagonism to the admitted policy of the law on the subject".

Far-reaching reforms relating to unilateral divorce have been introduced during the recent years, in a large number of Muslim countries.[34] It is high time that some thing be done in India too. It is interesting to note that under a decree of H.H. the Aga Khan, the Khojas in India have their own marriage tribunals and neither a second marriage nor a divorce is possible without recourse to these tribunals.[35]

Another condition laid down for husbands intending to divorce their wives is that they should not pronounce the divorce during the period of their wives 'menstruation'. This condition has been deemed necessary because a woman is liable to become ill-tempered and easily *irascible* during the period of menstruation. This physical disability leads her sometimes to act and behave in a manner which she disapproves herself on becoming clean. Vermilow in his *Biological Tragedy of Woman* makes some observation which is pertinent in this case:

> *"Women's mental equilibrium is upset during the period of menstruation... A woman street-car conductor pulls out the wrong tickets and is muddled in counting the change. A menstruating motor-woman drives the street-car slowly and with hesitancy, becoming confused at crossings. The lady typist's fingers strike the wrong keys, The woman dentist cannot find the proper instrument. An actress is not in the right mood and makes wrong gestures".* [36]

Havelock Ellis observes:

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[34] Tahir Mohmood, *Family Law Reforms in the Muslim World,* (Indian Law Institue, 1972).
[35] Khalid Rashid, *Supra* note 44, p. 97
[36] Vermilow, Biological Tragedy of Women, quoted by M.M. Siddique in Woman in Islam, p. 65.

> *"There is in this period greater impression-ability, greater suggestion and more or less diminished self-control. It is at this time that sudden caprices, fits of ill-temper, moods of depression, impulses of jealousy, outbursts of self-confession are chiefly liable to occur."*[37]

Another reason for this stipulation is that normal sexual relations between husband and wife are suspended for the time she undergoes her monthly course, and sexual relations are commonly the basis of love and amity between husband and wife. It is possible that, a couple may resume their normal attitude to each other and forget their quarrels when their sexual relations are restored after the period of menstruation. There is a tradition that 'Abdullah b. Umar divorced his wife when she was having her monthly period. His father reported the matter to the Prophet who became very angry and ordered that Abdullah should revoke his divorce and wait until his wife is clean, after which he is free to do as he liked. Another tradition states that the Prophet told Ibn Umar to observe the following procedure in divorcing his wife:

> *"Ibn Umar", said the Prophet, "you adopted a wrong method The right one is that you should wait for tuhr (period of cleanliness), then pronounce a divorce during tuhr and another during the second. During the third tuhr you should decide finally either to retain your wife or to divorce her".*

It is respectfully submitted that in *talaq-ul biddat* the form of *talaq* widely and indiscriminately practiced in India, the process prescribed by the Holy Prophet is hardly observed.

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[37] Havelock Ellis, Man and Woman, quoted ibd.

(b) Wife's right to divorce

The general survey in the foregoing pages reveals the right of divorce sanctioned in favour of the husband. In the following pages right to divorce sanctioned in favour of Muslim wife will be examined. There are two ways in which a woman is allowed to seek separation from her husband; first, through mutual agreement between the husband and the wife which is called *Khula,* secondly, through a judicial decree by filing a suit against the husband in a law court called *fask.* It will be seen that the wife is not at liberty like husband, to get herself released by an outright declaration of divorce. If her husband refuses to release her from the marriage bond, she has to go to a court of law and obtain a decree in her favour. This may seem to place her at a disadvantage in comparison with her husband and it may be asserted that this implies inequality of rights, as between husband and wife. Actually, the intervention of the state in this matter is a device for the fuller protection of her rights. Conditions all over the world, including even Western countries, are such that a woman is not altogether free to exercise the legal rights. The husband can, if he so desires, place many impediments in her way. If the state does not come to her help in order to safeguard her rights, the woman may find herself handicapped in many ways, despite all talks and preaching of sex equality. It is, therefore, in her own interest to seek the support of authority in defending and exercising her rights. This was all the more necessary in the past when woman's social position exposed her to greater difficulties.

As in the case of divorce by the husband, the legal permission given to

woman to seek and obtain separation through mutual agreement or through the intervention of the court does not imply moral approval of the act. Islam has unreservedly condemned men and women who use their legal rights of divorce except on legitimate grounds and in absolutely unbearable condition. Thus a tradition of the Prophet states: 'God does not like men and women who seek variety of sexual experience'. Another tradition says, 'God has showered curses on those men and women who make frequent use of divorce for the sake of sexual enjoyment' Again, the Prophet of God said; 'A woman who seeks divorce from her husband without any excess on his part will be cursed by God and His angels' Yet another *Hadith* says: 'Women who make a play thing of their divorce rights are hypocrites'. According to Ahmed and Tirmizi, the Holy Prophet of Allah said, 'Whichever woman asks her husband for divorce without fault, the fragrance of paradise is unlawful for her'. These warnings and moral exhortations are intended to discourage men and women from disturbing the stability of family life and resorting to separation except in cases of unavoidable necessity. Moral dissuasion apart, there is no dispute about a woman's legal right to seek separation from her husband. This she may do either by giving up a part or the whole of the dower given to her by the husband or by offering an arranged sum of money to her husband in return for his consent to release her from the marriage bond. Thus both men and women are required to undergo monetary sacrifice for securing their separation. This is likely to act as a deterrent in both cases. Should the husband refuse to part with his wife on any of these terms, it is open to the latter to the protection of law by filing a suit against him and obtaining a legal decree of separation.

Actual legal decisions by the Prophet of Islam show the spirit and principles which the law courts should apply to cases brought by women against their husband

The most famous among the cases is that of Thabit b. Qais whose two wives sought divorce from him. One of them Jamila bint Abi Salul, disliked his features. She came to the Prophet of God and complained against him, saying: 'O Prophet, nothing can bring him together with me. I lifted my face covering to see him coming along with a few other men and I noticed that he is the blackest, the most short-statures and the ugliest of them.' Another report says: 'she said, by God, I do not dislike his morals or behaviour, but 1 cannot stand his ugliness. According to Ibn Majah, she is reported to have said, 'By God, if fear of God did not stand in my way, I would have spit him on his face'. According to the author of Fath-al-Bari, Jamila said 'You see, O' Prophet, how beautiful I am, but Thabit is an ugly person'. Bukhari reports that she said to the Prophet: 'I do not blame him for his morals or religion, but I am afraid Islam will lose its hold upon me if I am compelled to live with him'. After hearing her complaint, the Prophet said to her, 'Will you give him back the orchard he gave you?' She replied, 'yes and also more, if he wants'. The Prophet asked her not to give more and ordered Thabit to accept the orchard and divorce her.

It will, thus, appear that distaste for the husband's appearance was considered a sufficient ground by the Prophet for the dissolution of marriage. It is significant that the Prophet did not endeavour to expound to Jamila the Philosophy about facial appearance agreeable or otherwise. What is important to note is that once the Prophet was satisfied that there existed a deep-seated distaste in the heart of the

wife for her husband, the marriage was ordered by him to be dissolved. The Prophet had, presumably, so ordered in view of the moral consequence. The repercussions thereof could have been harmful for character, religion and morality. These considerations must out-weigh the harmful ramifications of dissolution of marriage.[38]

Another wife of Thabit b Qais, Habibah bint Sahil, according to a report from Imam Malik and Abu Dawud, came to the Prophet early one morning. When the Prophet came out, he saw her standing before the door. On the Prophet's enquiry how she happened to be there, she replied: 'I and Thabit cannot pull together.' When Thabit came, the Prophet said to him: 'This is what your wife says about you, so leave her'. According to Ibn Majah, Habibah complained to the Prophet that Thabit had beaten her so badly as to break her bone. In any case, the Prophet, on hearing both sides of the matter, ordered dissolution of the marriage.

During the time of 'Umar, the second Caliph, a suit of divorce was brought to him. He advised the wife not to leave her husband and try to pull on with him. The woman refused to do so 'Umar put her in a dirty room for three days. On the fourth day he asked her how she had fared. She said that she had real peace of mind only for those three days, whereupon 'Umar ordered dissolution of her marriage'.

These three cases show that the mere fact of a woman having disgusted with her husband is sufficient ground for legal separation between them. In the case of Thabit b. Qais, the Prophet showed by his action that a woman's disapproval of her husband on physical grounds

[38] SAM Khusro, 'A Muslim Wife's right to dovorce: A note on the proper perspective', II No. 41 Is. & CLQ 2 December, 1982, p. 299.

is a legitimate ground for a decree of separation in her favour. It is enough for the court to satisfy itself that one of the partners had developed sufficient antipathy against the other to make reconciliation impossible. The court need not inquire into the detailed reasons of this antipathy, because a woman may dislike her husband on many grounds, some of which she may not like to state openly There may also be reasons for disgust which may not seem valid to the court or any other arbiter, but which may be sufficient to spoil the marital relations of husband and wife The court has no right to give its verdict on the point whether the reasons for dissatisfaction as expressed by the wife are valid. All it can do is to satisfy itself on the point whether the dissatisfaction is genuine or feigned, whether it arises from causes which are temporary and may disappear or it is so deep-rooted as to preclude the possibility of happier relations being restored.

It is inadvisable for the court to inquire whether a wife seeking divorce is doing so because she is sexually erotic and desires a variety of sexual pleasure or her aversion to her husband springs from genuine causes The right of a man to divorce is not limited by conditions that he should not use it for satisfying his anarchic sexual desire, the mere fact being unable to obtain a divorce from a law court will not prevent her from forming illicit unions, and in such a case the court, by refusing a decree of separation, will be supplying an incentive to illegitimate sexual activity which is morally and socially more reprehensible than frequency of divorces. The effect of a court decree in favour of separation is the same as that of the final divorce pronounced by the husband, which dissolves the marriage finally and irrevocably. The couple cannot be remarried unless the woman marries

another husband and gets a divorce.

As regards monetary sacrifices involved when a woman seeks divorce from her husband, it has already been stated that the husband cannot claim more than what he has already given to his wife as dower. If the separation comes as a result of mutual agreement without the intervention of the court, the amount has to be settled between the two partners. But if the dispute is brought to the court the latter can decide what portion of the dower should be returned by the wife, whether the full amount or half of it or one- fourth etc. Many jurists agree that if separation takes place as a result of the ill-treatment of the husband or his excesses, and such charges are proved during the process of legal inquiry, the court can totally exempt the wife from repayment of the dower, or it can decide in favour of an amount less than that of the dower, according to the circumstances involved. Some jurists are also of the opinion that if the court is satisfied that the wife has no legitimate grounds for seeking separation and is merely the victim of anarchic sexual impulses, it can order her to pay more than her dower.

Thus, it is established that under classical matrimonial laws, wife's right to divorce has been admitted. In India, the Dissolution of Muslim Marriages Act, 1939 was enacted in the light of the sanction delineated above.

(c) Indian scenario

(i) Divorce on wife's own initiative

Divorce on wife's own initiative as already stated assumes the form of a *talaq-i-tafwid* or a *Khula.* A Muslim wife can at the time of marriage

reserve in the *kabinnama* (marriage-deed) a right for herself to dissolve the marriage under certain specified conditions. This is styled as *tafwid-e-talaq* (delegation of divorce). A stipulation that, under certain specified conditions, the wife can pronounce divorce upon herself has been held to be valid, provided first, that the option is not absolute and unconditional secondly, that the conditions are reasonable and not opposed to public policy.[39] Stipulations such as wife's power to exercise divorce on the failure of payment of maintenance, contracting second marriage by husband, shifting of matrimonial home, interference with wife's movement consequent upon economic and social needs, wife's insistence not to live with her in-laws have been adjudged as valid and not in variance with the spirit of Islamic law. The wife exercising her powers under the agreement must establish that the conditions entitling her to exercise the power have been fulfilled.[40] It has been observed that *talaq-i-tafwid* is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and has become rife in India since thirties.[41]

Regardless of incorporation of such a clause in the *Kabinnama* as in the process of delegated divorce every Muslim wife is facilitated by the right to *Khula. 'Wife's right to Khula is parallel to the men's right of talaq* like the latter the former, too is unconditional".[42] 'In the matter of *Khula* if it is taken to the court, it is not for the court to enquire if she wants dissolution on a genuine ground or just for the sake of

[39] Asaf A.A. Fyze, *Outlines of Muhammadan Law,* (4th ed.) pp. 158-159.
[40] *Mirjan Ali v. (Mst.) Matmuna Bibi* AIR (1950) Cal. 304
[41] Asaf A.A. Fyzee, *'The Muslim Wife's Right of Dissolving her Marriage'* (1936) 38 Bom. Law Rep. J.I. 113.
[42] A.A. Maududi, Haquq al-Zawjayan, 10 (4th ed. 1964).

marrying another man'. If a wife thinks that it is no more possible for her to live with her husband, she would simply tell him that she needs a divorce. Where the husband is reluctant, the wife may straightaway proceed to the court for a decree of *Khula.* Here the husband may demand of the wife to relinquish her claim to dower.

Khula is extremely liberal and pro-woman law.[43] Although the institution of *Khula* has been grossly misunderstood by the Indian courts since the Privy Council's pronouncement in the *Moonshee Buzloor Raheem,*[44] its true spirit has been duly recognized by the courts of Pakistan and now of Bangladesh following the celebrated judgment by Pakistan Supreme Court in *Khurshid Bibi v. Mohammad Amin.*[45] It would be therefore, in the fitness of things that the court in India pass decrees of *Khula* under the residuary clause of section 2(ix) of the Dissolution of Muslim Marriages Act, 1939 enabling a Muslim wife to dissolve a marriage on "any other ground which is recognized as valid for the dissolution of marriages in Muslim law".

Table-i-tafwid and *khula* apart, accessible to a Muslim wife is the judicial divorce, styled as *fask* In India it may be granted on any of the grounds specified under the Dissolution of Muslim Marriages Act, 1939 Section 2 of the Act lays down that even a single ground incorporated therein is enough for a Muslim wife to secure a dissolution of her marriage. Among these grounds are missing of a husband, failure on the part of a husband to maintain his wife, imprisonment of husband, failure to perform marital obligations, impotency, insanity, leprosy, venereal disease option of puberty and

[43] Tahir Mahmood, *Personal Laws in Crisis,* (1986) p. 78.
[44] (1861) 8 MIA 379.
[45] PLD 1967 SC 97

cruelty. Unfortunately, however, the courts in India are reluctant to grant a divorce to a wife on the grounds in the Act. In *K.C. Moyin v. Nafeesa,*[46] Justice Khalid observed that under lib circumstances can a Muslim marriage be repudiated by the wife and he further said (hat a unilateral repudiation of marriage by way of *fask* by wife has no legal sanction

(ii) Divorce by mutual agreement

In Islamic law dissolution of marriage by mutual consent is known as *mubara'at.* It is a process in which a couple can jointly dissolve their marriage extra-judicially on the terms that may be mutually agreed upon. The word *mubara 'at* denotes the act of freeing one another mutually'. In case of *Khula* literally meaning 'to take off clothes', the wife to be released and the husband agrees for a certain consideration, which usually form a apart of the whole of the *mah,* while in *mubara* at apparently both are happy and may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution- any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman:

> "or has been guilty of incestuous adultery,
> or of bigamy with adultery,

[46] (1973), Kerala Law Journal, 181.

or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,
or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce à *mensa et toro,*
or of adultery coupled with desertion without reasonable excuse for two years or upwards".

While commenting on the Jordan case Lucy Carroll observed:

> *"Talk of family law reform or a uniform civil code frequently focuses on the major minority community, the Muslims. This is unfortunate because reform is needed elsewhere as urgently. Jordan Diengdeh v. S. S. Chopra*[47] *highlights the archaic divorce law that continues to govern Christians in India. Based on English matrimonial law of the mid-nineteenth century, the Divorce Act of 1869 has remained unchanged for nearly a century and quarter while the parent statute in England has undergone revolutionary change. Ironically, the Dissolution of Muslim Marriages Act 1939 would offer greater succor to the unhappy wife in the present case than the laws of her own community afford".*[48]

Earlier as back as 1960 Law Commission took up the matter for consideration However, the reform could not be carried out because of a section of the Christian community. In Law Commission's own words

> *"Coming next to divorce, the Roman Catholics have strongly pressed on us that divorce should not be recognized, as it is opposed to their faith, or, in the alternative, that they should be exempted from the provisions of this Act in so far as they relate to divorce. They say, basing themselves on the passage in the Bible, "What therefore God has joined together let not man put asunder", that, it is a fundamental article of the*

[47] ILR (1984) 2 Delhi 15 (High Court), (1985) 3 SCC 62.
[48] Lucy Carroll, "Family Law Reform and the Christian Community, A Comment on the Jordan Case", Islamic and Comparative Law Quarterly, Vol. VII No. 3, Sept. 1987

Christian faith that marriage is indissoluble; that the canonical law therefore does not recognize divorce; that the grant of divorce would be repugnant to it; and that therefore the provisions relating to divorce should not apply to them."[49]

Regarding grounds of divorce under section 10 of Indian Divorce Act, 1869, the Commission appreciated the well-founded criticism that it makes a distinction between the husband and the wife in the matter of grounds on which they could obtain divorce and that there is no justification for maintaining this distinction between them. It also entertained the view that this law has now become very much out of date, and that it is necessary to allow divorce on several other grounds, 'as has been done in all modern legislation'.[50]

Part of observation made by the Law Commission of India, however, evoked severe criticism from the National Specialized Agencies and Women's Equality which records its findings in the following terms:

"Regarding the grounds for divorce the Commission departs from its usual practice of clearly enunciating a proposal or turning down one by giving detailed reasoning. The provision in the Divorce Act provides for only one ground viz., adultery and even in this clearly differentiates between a husband and a wife. Adultery simpliciter is sufficient for a husband to proceed for divorce In the case of the wife, adultery is not sufficient, she has to prove aggravated adultery like incestuous adultery or adultery with cruelty The Commission recommends mildly a change by opining that there is criticism against this distinction and 'we agree with it' Headed by a retired Supreme Court Judge, there is no mention of the fact in 1960, many years after our constitution, this is violative of the fundamental rights prohibiting discrimination on the ground of sex. This point was forcibly argued when the Commission took up the case of the Christian

[49] Law Commission of India, Fifteenth Report (1960).
[50] Ibid.

matrimonial law for the third time in 1973 and the Commission headed by an eminent retired Chief Justice warned the Government that if they did not remove this provision, the courts would do so and that would result in a lacuna in the law, till the legislature moved and remedied the situation."[51]

The Commission recommended sweeping change of the much criticized section 10 of the Act containing grounds of Christian divorce. Appreciating the drive, the Agency noted that "while suggesting additional grounds for divorce 'as has been done in all modern legislation', the Report is clear and forthright".[52]

These all despite, the law on divorce was left stranded. No reform could be introduced till date. Again the problem of the Indian Divorce Act, 1869 was highlighted in one of the cases reported as recently as 1995. *Mary Sonia Zachariah v. Union of India*[53] is a case in point. In this case the grounds for dissolution of marriage by the Christian wife under section 10 of the Indian Divorce Act, 1869 was challenged as violative of Fundamental Rights guaranteed under Articles 14,15,19 and 21 of the Constitution. Indian women of all religions other than Christianity are entitled to get divorce [011] ground of cruelty and / or desertion without reasonable excuse for two years or more ^dependent grounds are available under the respective enactments. For Christians governed by Indian Divorce Act, besides cruelty and desertion, adultery should also be proved while seeking divorce. Direct proof of adultery by wife is well-nigh impossible. Provision for divorce is infructuous inasmuch as while husband is entitled to get divorce on the

[51] National Specialized Agencies and Women's Equality, Law Commission of India, prepared by Latika Sarkar, Centre for Women's Development Studies, New Delhi, pp. 88-89.
[52] Ibid.
[53] II (1995) DMC 27(FS) Kerala High Court, also, *Anil Kr. Mahsi v. Union of India,* I (1995) 254 Supreme Court of India; and Alice Jacob, 'Calls for Reforms in Christian Divorce Law', JILI Vol.

proof of adultery simplicitor, wife is obliged to prove either cruelty or desertion along with incestuous adultery. It is a sex-based discrimination and so this provision is constitutionally bad.... The antiquated and anomalous nature of the Act was noted by the Supreme Court and the other courts ....

The court found that the life of the Christian wife who is compelled to live against her will as wife of a man who hates her, treats her with cruelty, deserts her, will be a inhuman life imposed by tyrannical law— violative of Article 21. If such relationship is not allowed to put an end, it will lead to continued bickering, quarrels and litigation.

It was also observed by the court that there is a "real need of comprehensive reform" and "this judgment will have a compelling effect on the Central Government in finalizing its proposal for introducing comprehensive reform in the law governing marriages and divorce among Christians in India."[54]

It may be submitted that the inadequacy of the provision of the Indian Divorce Act B conspicuous. It has severely marred the interest of the parties, particularly, the wives. In *D'Souza's* case a Full Bench of the court had stated:

> *"The inadequacy of the provisions of (the Indian Divorce) Act is patent. Perhaps when this Act was passed by the Legislature in 1869 it was a progressive law. To-day one can almost say that it is an archaic law requiring serious reconsideration by Parliament to bring it in line with other laws governing marriage".*[55]

32:1.
[54] Id. p. 58.
[55] AIR 1980 Del. 275.

The reform was demanded from all sections of the intelligentsia. Kusum, while surveying the family laws observed that 'the need for reform in the Act is overdue.[56] Over the past few years there have been many cases which show that the Act is too harsh on the parties and hence needs to be amended and brought at par with other divorce laws in the country. A case decided by the Andhra Pradesh High Court reinforces this fact.[57]

(d) Delegated Divorce

A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may delegate his right to another person. In other words, instead of pronouncing the *Talaq* himself he may give his right of divorce to any one else, including his own wife. Even the presence of wife at the time of pronouncement of *Talaq* is not necessary. A *Talaq* pronounced in the absence of wife is lawful and effective. Divorce by such other person, who acts as agent of the husband under his authority, is called *Talaq-e-Tafweez* or delegated divorce. In the delegated divorce the *Talaq* pronounced by that other person is as effective as if it was made by the husband himself.

The husband may delegate his right of divorce to his own wife and authorize her to pronounce *Talaq*. According to *Fyzee*,[58] this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India. The authority

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[56] Kusum, *Annual Survey of Indian Law* (1990)
[57] Amarathala Hemalatha v. Desari Balu Rajendra Varprasad, AIR, 1990 AP 220.
[58] Outlines of Mohammedan Law, Fourth Edn.p. 159

it's given to the wife under an agreement at the time of the marriage or any time after it. The delegation of the power of divorce to the wife may either by permanent or temporary i.e. only for a specified duration. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband.[59]

The delegation may be unconditional or subject to certain condition or contingency. Where the delegation is conditional, the authority of giving *Talaq* cannot be exercised until that condition is fulfilled. The general practice is to delegate the power of divorce to the wife upon the husband's failure to fulfill certain conditions or upon the happening of an event. But the conditions must be of reasonable nature and must not be against the principles of Islam.

(e) Judicial Divorce

Judicial divorce means a divorce by the order of a court of law, granted on a number of grounds.

Before 1939, a Muslim wife could seek her divorce by a judicial decree only on the ground of (1) false charge of adultery by the husband against her (Lian), or (2) impotency of the husband, and on no other grounds. There were conflicting provisions in the various schools of Muslim law in respect of divorce by a wife through judicial intervention. It was felt by the right thinking persons of the Muslim society and also by the Government, that great injustice was being done to a Muslim society and also by the Government, -at injustice was being done to a Muslim wife in the matter of matrimonial relief. Accordingly, the Dissolution of Muslim Marriages Act, 1939 was

[59] D.F. Mulla; Principles of Mohammedan Law; 18th Edn. p. 332

enacted by the Central Legislature Under this Act, a wife married under Muslim law, may seek divorce by a judicial decree on any of the grounds enumerated therein. The Act is applicable to all the wives married under Muslim law irrespective of their schools or sub-schools.

The Dissolution of Muslim Marriages Act, 1939 may be considered as a landmark in respect of matrimonial relief to a Muslim wife. The wife's right of divorce, which was denied to her, was restored to her under the Act. Salient features of the Dissolution of Muslim Marriages Act, 1939, may be summarized as under:

(a) Section 2 of the Act contains certain grounds on the basis of any one of which a wife married under Muslim law, may file a petition for divorce. There are nine grounds in Section 2 out of which seven grounds are matrimonial guilt's (or faults) of the husband which entitle a wife to get her marriage dissolved by a court of law. Clause (vii) entitles the wife to exercise the right of option of puberty through a judicial decree. The ninth ground in Section 2 Clause (ix) is a residuary clause. Under this clause a wife may seek divorce on any other ground recognized under Muslim law which could not be included in the first eight grounds. For example, under this clause, a wife may seek her divorce by judicial decree on the ground of false charge of adultery against her (Lian). Thus, while giving some additional grounds of divorce to a Muslim wife, the Act has not affected her right of divorce on the ground already available under pure Muslim law.

(b) The grounds for matrimonial relief in Section 2 of the Act are

available exclusively to the wife. It is because Muslim law has already given an absolute right to the husband to divorce his wife without judicial intervention and without any reason.

Section 2 of the Dissolution of Muslim Marriage Act, 1939, provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds enumerated therein. The benefits of this Section may be availed by a wife whether her marriage was solemnized before or after the commencement of the Act. The provisions of Section 2 may be given retrospective effect. The specified grounds are as under:

(i) The Husband is missing for Four Years

(ii) Husband's failure to maintain the wife for Two Years

(iii) Imprisonment of the husband for Seven Years:

(iv) Husband's failure to perform marital obligations for Three Years

(v) Husband's Impotency

(vi) Husband's insanity, leprosy or venereal disease

(vii) Option of Puberty by wife.

(viii) Cruelty by the husband.

2.3 CHRISTIAN WOMEN AND DIVORCE

Section 10 of the Indian Divorce Act, 1869 sets forth the grounds on which a Christian marriage may be dissolved. A wife may present a petition for dissolution of the marriage to the District Court or to the High Court on any one of the following grounds:

(i) If the husband has exchanged his profession of Christianity for some other religion, after the solemnization of marriage and he

has gone through a form of marriage with another women the wife is entitled to get her marriage dissolved.

(ii) It means adultery committed by a man with a woman who he could not lawfully marry by reason of her being within the prohibited degrees of relationship even if his wife were dead. If a husband is guilty of such incestuous adultery, the wife can claim divorce on that ground.

(iii) If the offences of bigamy and adultery are committed by the husband during the subsistence of first marriage the wife can claim divorce if they are proved separately.

(iv) Wife is entitled to divorce on this ground after his marriage if he left his wife and subsequently married another woman.

(v) If the husband is found guilty of rape, sodomy or bestiality the wife may claim divorce on that ground. These offences are define a under Sections 375 and 377 of the Indian Penal Code.

(vi) Adultery with cruelty has not defined in the Act. It is "generally described as conduct of such a character as to have caused danger to limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger".

(vii) Desertion alone is not a ground for dissolution of marriage. It can be invoked as a ground only when the adultery is coupled with desertion without reasonable excuse for two years or upwards. The desertion can be actual or constructive.

A man and woman married under the Christian Marriage Act are not entitled to a degree of divorce by mutual consented. The grounds set

forth in Section 10 of the act are only grounds on which a Christian marriage can be dissolved. Therefore additional grounds can not be included by the judicial construction of some other Section unless that Section plainly intends so.

Thus it could be seen that a Christian wife can invoke seven grounds for dissolving the marriage. However the existing law appears to be deficient as it is very narrow in substance and application. It is suggested that the Act may be amended to make the law broader in sweep and effective in application.

Apart from the divorce, Christian women can seek judicial separation on the ground of adultery, cruelty and desertion without reasonable excuse for two years or upwards (Section 22). Similarly she can also claim restitution of conjugal rights under Section 32. She is also entitled to alimony *pendente lite* from the husband and also to permanent alimony (Section 36 & 37).

The Indian Divorce Act, 1969, requires a Christian Husband only to prove adultery simpliciter whereas requiring the Christian wife to prove adultery with one or other aggravating circumstances like desertion and cruelty. This discrimination has been taken note of by a few High courts in India. In *Pragati Varghese v. Syryl George Varghese*,[60] a full Bench of the Bombay High Court held that the different treatment which is accorded to Christian women under Section 10 is based nearly on the grounds of sex. Similarly if one compares the provision of the other enactments on the subject of Divorce, it would be clear that the Christian wives are discriminated and have been treated differently as compared to wives who are

[60] AIR 1997 Bom. 349,

governed by other enactments. The discrimination therefore is based on the ground of religion also. This discrimination is violative of Article 14 and 15 of the Constitution of India. Similarly if one has regard to the dealings with protection of life and personal liberty it would be clear that the position of Christian women has been rendered most demeaning as compared to Christian husbands as also wives governed by other enactments. In the light of this discrimination, the Bombay High Court held that the discrimination part of Section 10 of Indian Divorce Act, 1869 is violative of Article 21 of Constitution of India also.[61]

In *Jorden Deigndeh v. Chopra*,[62] suggested complete reform of law of marriage and introduction of mutual consent and irretrievable breakdown of marriage as grounds for divorce. The court berated for not introducing the changes into the Indian Divorce Act to bring it in tune with modern conditions.

In view of the clear discrimination against the Christian wives on. the ground of religion and sex and also in view of the fact that the High Courts of A. P. Bombay and Kerala have already struck down the discriminatory provision it is suggested that the Indian Divorce Act must be amended without delay and to remove the bias and also to render gender justice.

[61] See *Ammini Joseph v. Union of India*, AIR 1995 Ker. 252; *Youth Welfare Federation v. Union of India*, 1997 (1) ALD 347, *Swapna Ghosh v. Sadananada Ghos*, AIR 1989 Cal. 1.
[62] AIR 1985 SC 935

Chapter-3: Succession

Chapter-3

SUCCESSION

3.1 INTRODUCTORY REMARKS

The rights of women to succeed to any property vary from one religion to other depending on the personal laws followed by them. The religion played a very important role in the devolution of property on the woman in the earlier days. Initially the entire law of succession was uncodified but with the advent of modern governments and legislatures, most of the succession laws have been codified and consolidated. However there is no uniformity in the succession law relating to women following different religions. Even in England, the English women did not enjoy equal rights in the property and succession until the Equity courts started applying the principles of equity.

In India, the women enjoyed a secondary status with regard to the succession. This unequal status was sought to be removed by certain legislations governing different religions like The Hindu Women's Rights to Property Act, 1937, The Hindu Disposition of Property Act, 1916, The Hindu Inheritance (Removal of Disabilities) Act, 1928, The Indian Succession Act, 1925, and The Cochin Christian Succession Act, 1902.

The law relating to testamentary succession among Hindus, Christians and parsis etc., is contained in the Indian Succession Act, 1925. It does not make any distinction between the rights of women and men under a will.

3.2 HINDU WOMEN AND SUCCESSION

The Hindu law of intestate Succession has been codified in the form of The Hindu Succession Act, 1956, which bases its rule of succession on the basic mitakshara principle of propinquity, i.e., preference of heirs on the basis of proximity of relationship. Prior to 1956, there used to be two major schools of Hindu law viz. mitakshara and Dayabhaga which laid down different principles of succession. There was no uniformity in the rights of the Hindus following different schools to succeed to the property of a Hindu who died intestate i.e., without leaving a will behind him.

Before 1956, the property of a Hindu woman was divided into two heads viz. (a) Stridhan (b) Woman's Estate. Stridhan literally means woman's property. The Hindu law interpreted Stridhan as the properties received by a woman by way of gift from relations. It included movable as well as immovable properties. The texts relating to Stridhana except in the matter of succession are fairly adequate and clear. Manu defined Stridhana as that what was given before the nuptial fire, what was given at the bridal procession, what was given in token of love and what was received from a brother, a mother, or a father".[1] The property inherited by a woman from a male or female was not considered as Stridhana and it was not her absolute property for the purpose of inheritance.[2] However Bombay school considered the property inherited by a woman from a male other than a widow, and mother etc. as Stridhana. Under all schools of Hindu law, the property obtained by a woman in lien of maintenance by adverse

[1] See Mayne's Hindu Law and Usage, 13th Ed. 1995 at p. 875.
[2] *Mst. Devala v. Rup. Sir*, AIR 1960 MP: 1959 Jab. LJ. 598

possession and property purchased with Stridhan was considered as Stridhan.

- The Hindu woman had full rights of alienating the "stridhan", being its absolute owner. She could sell, gift, mortgage, lease or exchange the same in any manner she liked.

- On her death, all types of Stridhan passed to her own heirs and not to the heirs of her husband. Thus a Hindu woman had unlimited rights of enjoyment, alienation and possession in respect of "stridhan" as its absolute owner.

The Supreme Court has explained the meaning and nature of "Stridhana" in a recent judgment.[3] The properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof.

The other type of property that could be devolved upon the Hindu woman was called 'woman's Estate'. It was also called widow's estate. A Hindu woman could be the owner of woman's Estate in the same way as any individual subject to two basic limitations.

(a) She could not alienate the property (Corpus) and

[3] *Rashmi Kumar v. Mahesh Kumar Bhada* (1997) 2 SCC 397

(b) on her death, it devolved upon the next heir of the last full owner.

In other words, she had only 'limited estate' in respect of this kind of property. She had full powers of possession, management and enjoyment of such property but she had virtually no power of alienation or transfer. However she could alienate the property in certain exceptional cases like (a) legal necessity i,e. for her own needs and for the need of the dependants of the last full owner, (b) for the benefit of estate and (c) for the discharge of indispensable religious duties such as marriage of daughters, funeral rites of husband, his 'Shraddha' and alms to poor for the salvation of his soul. In other words she could alienate the property for the spiritual benefit of the last full owner but not for her own spiritual benefit. So the rule in *Hanooman Prasad v. Babooeee Mumraj*[4] applied to alienation of woman's estate also. The women's estate was normally taken by the woman either by way of property obtained by inheritance or as share obtained on partition.

The foregoing brief discussion makes it amply clear that the position of Hindu woman in relation to property and succession was not satisfactory and uniform. The rights varied depending on the school to which she belonged and the nature of property that devolved upon her. The Hindu Women's Right to Property Act, 1937 made some changes in succession in respect of separate property of a mitakshara Hindu and in respect of all properties of a Dayabhaga Hindu. It provided for right of survivorship and right of partition to a Hindu widow of mitakshara school in coparcenary property. However she was not accorded the

[4] (1856) 6 MIA, 393. Also see *Harisatya v. Mahadev*, AIR 1983 Cal. 76.

status of a coparcener. This uncertainty was put to rest by codifying the entire Hindu law of succession in 1956.

The Parliament has enacted the Hindu Succession Act, 1956 to amend and codify the law relating to intestate succession among Hindus. This Act is applicable to all the Hindus, Buddhists, Janis and Sikhs by religion. Section 14 of the Act made radical changes in the rights of a Hindu woman to succeed to a property. "Property" in this context includes both movable and immovable property acquired by a female Hindu by inheritance or device or at a partition or in lieu of maintenance or by gift from any person, before or after her marriage.[5] It is a comprehensive definition which covers all kinds of property and also covers the erstwhile women's estate.

Section 14 has been specifically made applicable to the pre-Act women's estate also and it has been given retrospective effect. Thus the rule of full ownership is applicable to all kinds of properties vested in and held by a woman when the Act came into force.

The Act abolished the limited ownership of a Hindu woman in respect of the property held by her as woman's estate, by converting it into full ownership. Limited owner commonly means a person with restricted rights as opposed to full, owner with absolute rights. In relation to property absolute, complete or full ownership comprises various constituents such as the right to possess, actual or constructive, power to enjoy i.e. determining the manner of use extending even to destroying, right to alienate, transfer or dispose off, etc. Any restriction or limitation on exercise of these rights may result in limited or

[5] See Explanation to Section 14 of the Act.

qualified ownership.[6] Now, after 1956, no distinction could be made between the stridhana and women's estate, as the erstwhile women's estate is converted into 'stridhana' by Section 14 of the Act.

Where any property is given to a female Hindu in lieu of her maintenance before the commencement of the Hindu Succession Act , such property becomes the absolute property I of such female Hindu on the commencement of the Act provided 1 the said property was possessed by her, by virtue of Section 1 14 (1) of the Act. This is not withstanding the limitations, or restrictions contained in the instrument, grant or award where under the property are given to her.[7]

The Mitakshara bias of preference of males over females and of agnates over cognates has been considerably whittled down by the Act. An analysis of the various provisions of the Act makes it clear that the position of women has improved considerably, as compared to the pre-Act position in the matter of succession. In the matter of succession to the property of a Hindu male dying intestates. Section 8 lays down that it shall devolve firstly upon the heirs specified in Class-I of the Schedule to the Act, secondly, in the absence of any Class-I heirs on the Class-II heirs; Thirdly in the absence of Class I and II heirs upon the agnates[8] of the deceased and lastly if there are no agnates, thereupon the cognates[9] of the deceased.

It is worthwhile to note that there are as many as 8 females in Class-I heirs. They are (1) daughter (2) mother (3) widow, (4) daughter of a

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[6] *Kalavati Bai Sourya Bai* (1991) 3 SCC 410 at 424.
[7] *Nazar Singh and other v. Jagit Kaur and others*, (1996) 1 SCC 35 See also *Kalavati Bai v. Sourya Bai* (1991) 3 SCC 410
[8] 'Agnate' is defined by Section 3(a) of the Hindu Succession Act, 1956.
[9] Cognate is defined by Section 3(a) of the Hindu Succession Act, 1956.

predeceased son (5) daughter of a pre-deceased daughter, (6) widow of the pre-deceased son (7) daughter of a pre-deceased son of a pre-deceased son and (8) the widow of a pre-deceased son of a pre-deceased son. All these female Class-I heirs take their shares on par with their male counter parts as per the scheme of distribution contained in Section 10 of the Act. Similarly, there are number of females among the Class-II heirs. With regard to the remote heirs, the rule of agnatic preference over cognatic heirs reasserts itself, which is an indication that there is still some degree of discrimination against females.

The Hindu Succession Act has abolished the practice of reversion. It may be recalled that one of the characteristic features of the women's estate was that the female owner had no independent stock of descent in respect of it. On her death, the estate reverted to the heirs of the last full owner as if the latter died when the limited estate ceased.[10] Such heirs could be male or female. They were known as reversioners who had only a speck succession during the life time of the owner of the women's estate or till termination of such estate by other means like surrender, her remarriage etc.

Even though the Act has abolished this discriminatory practice, still it makes a distinction between the various properties inherited by the female from different sources, thus the concept of reversionary inheritance still lurks in the back ground. It could be clearly seen by the impact of Section 12 which regulates the order of succession among agnates and cognates of the deceased -male dying intestate and more particularly Section 15 (2).

[10] *Moni Ram v. Kerry*, (1880) 7 IA 115.

Section 15 deals with succession to a Hindu Female's property of a female Hindu. This is the first statutory provision dealing with succession to the property of female Hindu. The previous enactments like the Hindu Law of inheritance (Am) Act, 1929 and the Hindu woman's Rights to Property Act, 1937, dealt with succession to the property of a male. For the purpose of succession, a female Hindu's property is divided into three categories; (1) property inherited by a female from her father or mother; (2) property inherited from her husband or father-in-law and (3) Property which she herself required any other manner from any other source as her absolute property. The property mentioned in the first two categories devolves upon her death intestate upon the heirs of her father in the absence of any son or daughter of the deceased and upon the heirs of the husband respectively. Her absolute property mentioned in the third category above devolves upon any of the five classes of the heirs described in Section 15 (1) subject to the rules set out in Section 16: Her sons, daughters who include children of pre-deceased son or daughter and husband take precedence over the heirs of the husband.

Section 23 makes special provision respecting dwelling houses. The object of the section seems to be to prevent fragmentation or disintegration of a family dwelling house at the instance of a female heir to the prejudice of the male heirs[11] if a female Hindu inherits a dwelling house along with male heirs she has no right to claim partition of such house until the male heirs divide their respective shares. However a female heir, not being an unmarried daughter is entitled to reside in the dwelling house. A" deserted wife or a female

[11] *Janabai Amma v. Palani Mudahar*, (TAS) 1981 Mad. 62.

separated form her husband or a widow is entitled to a right of residence in the dwelling house. A share in a dwelling house cannot be claimed by married daughters.[12]

The expression 'dwelling house' though not defined by the Act, is referable to the dwelling house in which the intestate Hindu was living at the time of his/her death; he/she intended his/her children who continued to normally occupy and enjoy it. He/She regarded it as his/her permanent abode.[13] Under Section 23 a female heir's to claim partition of the dwelling house of a Hindu dying intestate is to be deferred or kept in abeyance during the life time of even of a sole surviving male heir of the deceased until he chooses to separate his share or ceases to occupy it or lets it out.

Section 24 lays down a disqualification for succession against (i) the widow of a pre-deceased son (ii) the widow of a predeceased son of a pre-deceased son (iii) the widow of a brother of a Hindu intestate if such widow has remarried on the date when the succession opens. The remarriage, if takes place after the opening of the succession does not divest such females of the property.[14] The disqualification is confined to only three classes of widows mentioned supra and not to the other widows. In other words, once the succession is opened, a widow can not be executed from succession even if she marries again. In *Velamuri Venkata Siva Prasad v. Kothuri Venkateshwarlu,*[15] the Supreme Court held that Section 2 of the Hindu Widow's Remarriage Act, 1856 for cesser of widows rights in deceased husband's property, remained

[12] Dharam Singh v. Aso and another, 1990 (Supp) SCC 684
[13] *Narsimham Murthy v.Sheetala Bai* (1996) 3 SCC 644.
[14] *Chanda v. Khubala,* AIR 1983 Pat. 33.
[15] (2000) 2 SCC 139.

effective and would be applicable even in case of a void marriage. The court further held that the same remained effective even after the enactment of the Hindu Succession Act, 1956 and was repealed only by Act 24 of 1983 and not by the 1956 Act.

Coparcenary means that part of a Joint Hindu family which consists of persons who by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce its partition.[16] A female Hindu was not considered as a coparcener.[17] Thus she could not enjoy the right of survivorship. She had only certain inferior rights such as that of maintenance since she was not a coparcener, she was not entitled to act as the manager or karta of a Joint Hindu Family. The Hindu women's Rights to property Act, 1937, makes a serious in road upon the rule of survivorship, by making the wives of coparceners entitled to the interests of male coparceners in a Mitakshara family on their death. However under the provisions of this Act, the male issue of the deceased coparcener remained coparceners along with the other surviving coparceners. The Hindu Succession Act, 1956 did not disturb this principle and still retained the same concept of Mitakshara coparcenary.

Certain States in India like Andhra Pradesh, Tamil Nadu and Maharashtra have realized the difficulty that arises by excluding the daughter's right to claim partition in coparcenary property. In order to confer equal rights on Hindu women along with the male members in the coparcenary under the Hindu mitakshara law, these State

[16] *State of Maharashtra v. Narayana Rao*, AIR 1985 SC 716, 719 (para 279).
[17] *CED v. Harish Chandra*, (1987) 167 ITR 230 (All.)

legislatures have amended the Hindu Succession Act, 1956 to achieve the Constitutional mandate of equality.

- A clear perusal of the Andhra Pradesh Amendment inserted by Andhra Pradesh Amendment Act 13 of 1986 shows that, in the State of Andhra Pradesh.

- The daughter of a coparcener shall become a coparcener by birth in her own right and her status. is equal to that of a son. She enjoys the same rights in the coparcenary property as a son. She is entitled to all the rights of coparceners including the right of survivorship. She will be subject to the same habitats and disabilities in respect of coparcenary property as the son (S. 29-A).

- She becomes the absolute owner of the property inherited by her as a coparcener (S. 29-A).

- When a female Hindu dies after coming into force of this amendment (i.e. after 5-9-1985), having at that time interest in Mitakshara coparcenry, her interest will be devolved by survivorship upon the other coparceners. But if the deceased dies leaving behind any children or children of pre-deceased child at the time of death, the devolution will be in accordance with the provisions of the Hindu Succession Act and not by survivorship. (S. 29-B)

Similar amendments are made in Tamil Nadu by the Hindu Succession (Tamil Nadu Amendment) Act, 1990 (1 of 1990) w.e.f. 25-3-1989, and in Maharashtra by the Hindu Succession (Maharashtra Amendment)

Act, 1994 (46 of 1994 w.e.f. 22-6-1994). These legislations are beneficial to the women who form part of vulnerable sections of the society and it is necessary to give a liberal effect to them.[18]

3.3 MUSLIM WOMAN AND SUCCESSION

The Muslim Law of Succession is basically different from the other indigenous systems of India. The distinction between the self acquired and ancestral properties, concepts of right by birth coparcenary property, survivorship and partition etc. are not known to Islamic law of succession which is based on the tenets of the holy Qur'an. No woman is excluded from inheritance only on the basis of sex. Women have, like men, right to inherit property independently, not merely to receive maintenance or hold property in lieu of maintenance.[19] Every woman who inherits some property is its absolute owner like a man. There is no concept of either stridhan or women's limited estate. Consequently there is no scope of any reversion upon the death of a Muslim woman because it devolves upon her own shares and not on those of her husband.

The Muslim law of succession which is uncodified, makes no distinction between a property of deceased male or female. Some authors on Muslim law feel that the Muslim law of property and succession in India has been considerably influenced by the local concepts and institutions.[20] Inheritance at Muslim law– position of woman:

Position of women in Pre-Islamic Law: the principles of the Pre-

[18] *Sai Reddy v. Narayan Reddy*, (1991) 3 SCC 647
[19] *Dr. Tahir Mahmood*: The Muslim Law in India, (1980) at p. 243
[20] Ibid.

Islamic customary law may be summarized as under:

- The nearest male agnate(s) succeeded
- Females and cognates were excluded,
- Descendants were preferred to ascendants and ascendants to collaterals
- Where the agnates were equally distant, the estate was per capita.

It is clear that the females were discriminated against, as they were virtually excluded form the inheritance.

Position of women in Islamic Law: The main reforms by Islam may be stated briefly as under.[21]

- The husband/ wife were made an heir
- Females and cognates were made competent to inherit
- Parents and ascendants were given the right to inherit even when there were male descendants
- As a general rule, a female was given one half the share male.

The newly created heirs were mostly females, but where a female was equal to the customary heir in proximity to the deceased, the Islamic law gave her half the share of the male. For example, if a daughter co-existed with the son, or a sister with a brother, the female obtained one share and the male two shares.

At present, males and females have no equal rights over property. This is manifest when there are two heirs of opposite sex in the same

degree. Then the male heir lakes two shares and the female heir takes only one share. Thus, a daughter does not, however, by reason of her sex, suffer from any disability to deal with her share of the property. She is the .absolute owner/master of her inheritance. The same rule applies to a widow or a mother. There is no such thing as a widow's estate, as in Hindu law, or the disabilities of a wife, as under the older English common law.

Hanafi Law of Inheritance: Under the Hanafi law, the heirs of a deceased, male or female, fall under the following classes:

I The sharers,

II The Residuaries,

III The Distant Kindred and

IV The State by escheat

There are twelve sharers in number who are given specific shares. However their shares are not permanently fixed as each heir may be affected by the presence of other sharers. Sometimes, a sharer may be totally excluded from inheritance. The sharers include Father, True Grandfather, Husband, wife, mother, True Grandmother, Daughter, Son's Daughter how so ever, uterine Brother, Uterine Sister, Full Sister, Consanguine-Sister. There are as many as 8 female sharers who could inherit the property of a deceased Muslim.

They are certain shares who are excluded from taking their specified sharer, if a residuary of equal rank co-exists. In such a case they become residuaries. They are also called chronic residuaries. They are entitled to inherit, if there are no sharers, if there are sharers, but there

[21] A.A.A. Fyzee: Outlines of Mohammedan Law (4th ed), at 390.

is a residue left after satisfying their claims. In the presence of such circumstances either the whole inheritance or the residue as the case may be devolves upon residuaries in the order prescribed by the Koramic Text.[22] These residuaries include:

I. Descendants viz (1) Son (2) Son's Son how so ever

II. Ascenda viz (3) Father (4) True Grandfather how high so ever

III. Descendants of Father viz. (5) Full Brother (6) Full Sister (7) Consanguine Brothers (8) Consanguine Sisters (9) Full Brother's Son (10) Consanguine Brother's Son (11) Full Brother's Son's Son (12) Consanguine Brother's Son's Son.

IV. Descendents of True Grandfather how high so ever Viz. (13) Full Paternal uncle, (14) Consanguine Paternal uncle, (15) Full Paternal uncle's Son, (16) Consanguine Paternal uncle's son, (17) Full Paternal uncle's son's son, (18) Consanguine Paternal uncle's son's son, (19) Male Descendants of more Remote True Grand Father.

In all, only four females are included among the residuaries in the form of Full sister, consanguine sister, the daughter and the son's daughter how low so ever: No other female can inherit as a residuary. All the four females inherit as residuaries with corresponding males of a parallel grade. Of the five heirs that are always entitled to some share of the inheritance and who are not liable to exclusion in any case viz (1) the child i.e., son or daughter (2) father (3) mother (4) husband (5)

[22] Mulla: Principles of Mohemmadan Law Ed. by M.Hidayatullah, 19th Ed. 1990 pp. 56, 55.

wife, there could be three females in the form of mother, daughter and wife.

In the absence of sharers and residuaries, the inheritance is divided among 'distant kindred' which consists of four classes viz the Descendants of the deceased, ascendants of the deceased descendants of parents and descendants of immediate grand parents. There are number of females in all these four classes, who are remotely related to the deceased. The first of the class exclude the second and the second excludes the third, so on.

The Shias divide heirs into two groups, (i) heirs by consanguinity i.e. blood relations and (ii) heirs by marriage i.e. husband and wife. Among the blood relations mother, daughter, sister, grandmother, paternal aunt, and maternal aunt are the females who are entitled to inherit the property of the deceased. They are called sharers. They take different shares depending on certain conditions like existence of other sharers and relatives. However it may be noted that wife takes normally $^{1}/_{8}^{th}$ share in the property of the husband but the husband takes ¼ th share in the property of the wive i.e. double the share of the wife in similar circumstances. Among the Shias, there is no separate class of heirs corresponding to the distant kindred of Sunni law.

Even though the protagonists of the Muslim law claim that there is absolute equality among the women and men in the matter of succession, there are certain provisions which are loaded in favour of the male inheritors as they take more shares, compared to their female counter parts. For example, among the Shias, a childless widow takes no share in her husband's land but she is entitled to her one-fourth

share in the value of trees and buildings standing thereon, as well as in his movable property.[23]

3.4 CHRISTIAN WOMEN AND SUCCESSION

The entire Christian law of succession is codified and governed by the Indian Succession Act 1925. The Act regulates the intestate as well as testamentary succession among the Christians and also others

Part V of the Act, and Sections 29-56 deal with the intestate succession. This part is not applicable to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina. In other words this part is applicable to the property of the Christians and Parsis only. Chapter-II of Part V of the Act deals with the Rules in cases of Intestate other than parsis. According to Section 32, the property of an intestate devolves upon the wife or husband on upon those who are the kindred of the deceased.

According to Section 33, where the intestate has left a widow and also any lineal descendants, one third of his property shall belong to his widow and the remaining two thirds shall go to his lineal descendants. But if there are only distant kindred left along with the widow but no lineal descendants, one half of his property shall belong to his widow. If he has not left behind any lineal descendants or distant kindred but only the widow, she takes the entire property. Therefore the share of the wife is not fixed and is variable depending on certain circumstances.

Thus the widow is made to share the property along with the other

[23] Mulla: Principles of Mohammedan Law, 1990 at para 113, p. 98

relatives of the husband in certain cases. On the whole the position of the Christian women is unhappy as was the case of the Hindu women prior to the Act of 1956. The lineal descendants and the kindred also consist of many female heirs who take their shares in the property of the intestate as per the Rules of distribution contained Sections 36 to 49 of the Indian Succession Act, 1925.

Chapter-4: Maintenance

Chapter-4

MAINTENANCE

4.1 INTRODUCTORY REMARKS

The chapter of maintenance has been discussed under the following headings and sub-headings: Maintenance of Wife under Hindu, Muslims, Christian and Parsi Laws- (a) Analysis of the legislative provisions (b) Evaluation of the judicial pronouncements (c) Identification of pitfalls (d) Advocacy of reforms and improvements.

Maintenance of wife under Hindu Law deals with the relevant provisions of Modern Hindu Law regarding the Maintenance of wife. It is a noteworthy fact that the maintenance of wife under the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956. The 'evaluation of the judicial pronouncements' in which the judicial pronouncements of the various High Courts and Hon'ble Supreme Court regarding the maintenance of wife under the Hindu Laws have been evaluated. In the process of the evaluation of the judicial pronouncements the issue involved in the case, the contention of the petitioner and the respondent, the order or the judgments of the respective High Courts or the Hon'ble Supreme Court and the merits or the demerits of the judgments has been humbly tried to put forth. Further, 'the identification of pitfalls' deals with the areas which has been in the serious requirement to be noticed and calls for some responsible steps for the reformation by the appropriate authority. The area of the pitfalls has been found during the process of the analysis of the legislative provisions and the evaluation of the judicial

pronouncements. Lastly, the advocacy for reforms and improvements which deals with the suggestions and the progressive ideas for coping up with these areas of pitfalls.

Maintenance of wife under Muslim Law deals with the responsibility of the Muslim husband to maintain his wife in the form of *Kharch-i-pandan.* After this the controversy between the Criminal Procedure Code, 1973 and Muslim Personal Law regarding the maintenance of Muslim divorcee has been discussed. The agitation of the Muslim community due to the controversial judgment of the *Shah Bano's* case which paved the way to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has also been analyzed under this heading. The 'Evaluation of the judicial pronouncements' deals with the evaluation of the decisions of the various High Courts and Hon'ble Supreme Court regarding the maintenance of Muslim divorcee. The evaluation of the cases and judicial pronouncements describe the judicial scenario before and after the *Shah Bano's* judgment. This heading also deals with the cause of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, and the role of judiciary towards the application of the provisions of this enactment. The reasons have also been mentioned as to why the judiciary is sometimes blamed for promoting the application of the provisions of Cr.P.C., rather the provisions of this enactment regarding the maintenance if Muslim divorcee through the sufficient case laws. Further, this part in the identification of pitfalls shows some loopholes in the hurry and rash drafting of the Muslim Women (Protection of Rights on Divorce) Act, 1986. These loopholes may be blamed to allow the judiciary to distort some intactable rules of Muslim Law

regarding the maintenance of Muslim divorcee in the guise of the judicial activism which can't be said a proper way for the intrusion in the personal law of any community. Lastly, this part which is the 'advocacy of reforms and improvements', covers some humble suggestions regarding the reformation of some provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 , as this Act has the heavy responsibility to represent manifestly the Islamic Community to the whole world.

Maintenance of wife under Christian Law deals with the analysis of the relevant provisions of the Indian Divorce Act, 1869, regarding the maintenance of wife under the Christian Law. Further it deals with the evaluation of the judicial pronouncements.

Maintenance of the wife under Parsi Law deals with the relevant provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife. After the analysis of the legislative provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife, the rest of the headings, i.e., evaluation of the judicial pronouncements, identification of pitfalls, advocacy of reforms and improvements have been discussed.

4.2 MAINTENANCE OF WIFE UNDER HINDU LAW

(a) Analysis of Legislative Provisions

The relevant legislations which govern the maintenance of wife under Hindu law are: The Hindu Marriage Act, 1955, and the Hindu Adoption and Maintenance Act, 1956. Provisions contained therein would be discussed to know the legislative position of wife under Hindu law. The relevant provisions are: Section 24, and Section 25 of

the Hindu Marriage Act, 1955, and Section 18 of the Hindu Adoption and Maintenance Act, 1956. Section 24 of the Hindu Marriage Act, 1955, deals with the alimony *pendente lite* and the expenses of the proceedings. This Section empowers the court to order the respondent to pay the petitioner the expenses of the proceedings, if it appears that either wife or the husband has not independent income for his or her support and to meet out the necessary expenses of the proceedings. It is to be noted that the court while making order under this Section, pays due regard to the petitioner's own income and the income of the respondent.

The Marriage Laws (Amendment) Act, 2001 was introduced. This amendment inserted the proviso in Section 24 of the Hindu Marriage Act, 195 5, which aimed to fix the duration of six months in the disposal of the application of the payment of the expenses of the proceeding and monthly sum during proceeding within the sixty days from the date of the service of notice on the wife or husband, as the case may be. Section 25 of the Hindu Marriage Act, 1955 deals with the permanent alimony and maintenance. It comprises three Subsections. Subsection 1 of this Section deals with the condition where any husband or wife may for the permanent alimony or maintenance at the time of passing any decree or at any time subsequent thereto. This Subsection empowers the court to order the respondent to pay the maintenance and support the gross sum or the monthly or periodical sum for a term not exceeding the life of applicant. According to this Subsection the responsibility of the paying spouse ends on the marriage of the other spouse. The court fixes the amount of permanent alimony and maintenance, keeping in view the

respondent's own income and other property and the income and other property of the applicant. The court may, if necessary, also secure the payment of permanent alimony by a charge on the immovable property of the husband. Subsection 2 of this Section says that after the passing of the order of the payment of permanent alimony under this Section, in case the court is satisfied that there is a change in the circumstances of either party. In this condition, the court may, at the instances of either party, vary, modify or rescind any such order in such manner as court deems just. Subsection 3 of this Section empowers the court to rescind the order of the payment of permanent alimony, if it is satisfied that the party in whose favour an order has been passed under this Section has been remarried or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he had sexual intercourse with any woman outside the wedlock.

Section 18 of the Hindu Adoption and Maintenance Act, 1956, deals with the married women's right to reside separate and claim maintenance. This Section comprises three Subsections. Subsection 1 of this Section entitles the Hindu wife to get the maintenance from her husband during her life time. The right to be maintained is irrespective of the fact that whether she was married before or after the commencement of the Act. Subsection 2 of this Section provides justifiable grounds to the Hindu wife under clause (a) to clause (g) which entitle the Hindu wife to live separately from her husband without forfeiting her claim to maintenance. The grounds are desertion, cruelty leprosy, having another wife by the husband, keeping a concubine by the husband, conversion from Hinduism to another religion by the husband or any other justifiable cause.

Sub-Section 3 of this Section disentitles the Hindu wife to separate residence and claim of maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

The rule laid down in Section 18 of the Hindu Adoption and maintenance Act, 1956 must also be read with Section 23 of this Act which lays down that it shall be the discretion of the court to determine whether any, and if so what maintenance shall be awarded under the provisions of this Act.[1] Here in this Section, the right of the Hindu wife whether married before or after the commencement of this Act, to be maintained by her husband during her life time has been, reiterated substantially in Subsection (1).However, this Subsection (1) must be read with Subsection (2) and Subsection (3). Subsection (3) is an exception to Subsection (1) which lays down that the Hindu wife can not claim separate residence and maintenance, if she is unchaste or ceases to be a Hindu by conversion to another religion. Subsection (2) shows the justifiable ground upon which a Hindu wife lives separately from her husband without forfeiting her claim to maintenance.

Clause (a) of Subsection 2 of the Hindu Adoption and Maintenance Act, 1956 deals with the "Desertion of wife by husband". This clause aims at giving the meaning of desertion as abandonment of the wife by the husband without reasonable cause without her consent or against her will or willful neglect of the wife by the husband. It accords with the meaning given to the expression as used in Section 13(1) of the Hindu Marriage Act 1955. The only distinction between Section 18(2) (a), and explanation to Section 13(1), the Hindu Marriage Act, 1955 is that under the latter the petitioner should show the respondent had

[1] Mulla, Principles of Hindu Law (ed. 19th, 2006, New Delhi), p. 565

deserted him or her for a period of 2 years prior to the presentation of the while under Section 18(2)(a) of the Hindu Adoption and maintenance Act, 1956, desertion might be any duration.[2] A full bench of the Kerala High Court has held that if a husband had deserted the wife, the wife need not give the proof of animus.[3]

Clause (b) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the "cruelty" by the husband to wife. For succeeding the claim of cruelty, the wife must prove two distinct element, first, ill treatment complained of, and secondly, the result and danger of apprehension thereof. Any conduct of husband which causes disgrace of wife or subject to a course of annoyance and indignity amounts to legal cruelty. The harm apprehended by the wife may be a mental suffering as distinct from bodily harm, because the pain of the mind may be even more severe than bodily pain.[4]

In *Swajyam Prabha v. A.S. Chandra Shekhar,*[5] it was held that "the baseless allegations about the adultery would constitute mental cruelty to the wife, so that cruelty is a solid ground for claiming maintenance and separate residence". It is well settled principle of law that leveling allegations of adultery without proper foundation and basis would tantamount to perpetrating mental cruelty on the other spouse.[6] In *Ram Devi v. Raja Ram,*[7] the husband by his conduct made it evidently clear that she was not wanted in the house and her presence was resented by him, it was held that this amounted to cruelty and justified wife's living

[2] Preeti Sharma, Hindu Women's Right to maintenance (ed. I, 1990, New Delhi) p. 135.
[3] Raghavan v. Satyabhama Jaya Kumari AIR 1985 Kerala 193 (FB)
[4] Supra note: 2, p. 136
[5] AIR 1982 Kant. 295.
[6] Madan Mohan v. Sarda AIR 1967 Punj. 397; Iqbal Kaur v. Pritam Singh AIR 1963 Punj. 242; Mohinder Kaur v. Bhagram Air 1979 P & H 71.
[7] 1963 All. 564.

separately.

Clause (c) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956, deals with the "Leprosy" of the husband. A Hindu wife is also entitled to live separately from her husband and has a right to claims maintenance from him on the ground that he is suffering from a virulent form of leprosy. It may be noted that no period is prescribed, but it must be existing at the time when the claim for maintenance is made.[8] It does not make any effect whether the disease started before or after the coming into force of the Act.[9] A mild type of leprosy which is capable of treatment can not be called virulent leprosy which is malignant and contiguous and in which prognosis is usually grave.[10]

Clause (d) of Section (18)2 of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "the husband having another wife. A Hindu husband can not marry another wife after the commencement of the Hindu marriage Act, 1955. Act lays down monogamy as a rule of law. This gives the right to a wife to claim maintenance, while living separately without forfeiting her claim to maintenance on the ground that his husband has another wife living with him. The interpretation of this Subsection has resulted into conflicting judicial pronouncements by the entitlement of the second wife to claim maintenance from the husband after the commencement of the Hindu Marriage Act, 1955.[11] In *Annamalai v. perumayee Ammamal*,[12] the High Court of Madras has held that clause (d) of sec-18(2), would apply only in case of marriage solemnized before this

[8] Supra Note: 4, p. 137
[9] Supra Note: 1 p. 569
[10] Sivaraya v. C.C. Padma Rao (1974) 1. SCJ 79.
[11] Supra Note: 1 p. 570.
[12] AIR 1965 Mad 139, 141

Act came into operation. The Andhra Pradesh High Court had earlier taken the view that the second wife would be entitled to claim maintenance under this provision.[13] The High Court of Calcutta has taken the view that second wife would not be so entitled.[14] The Madhya Pradesh High Court as well as the Bombay High Court had in the context of Sections 24-25 of the Hindu Marriage Act, 1955 and also taking into consideration of present Section had expressed the view that the expression 'wife' and 'husband' used in the Act can not be given a strict literal meaning so as to convey only a legally married husband and wife. It was also held that the word used in Section would refer to parties who have gone through the ceremonies of marriage, and the court can make order of maintenance at the instance of the second wife.[15] The Andhra Pradesh High Court in a recent full bench decision over ruled the earlier decision while holding that second wife is not entitled to maintenance under this Section, since after coming into force of the Hindu Marriage Act, 1955, bigamous marriage is prohibited. The second Marriage being void, the second wife cannot claim maintenance under this Section since the parties to the marriage will not have the status of legally married husband and wife.[16] The decision of the High Court of the Bombay in Kirshnakant's Case was overruled by the decision of the Full Bench.

In *Bhau Saheb v. Lilabai*[17] which took the view that petition challenging the nullity of marriage by Virtue of Section 5(1) of the Hindu Marriage Act, 1955, is petition seeking declaration of the nullity

[13] C. Obula Konda Reddy V.C. Pedda Venkata AIR 1976 AP
[14] Ranjit Bhattacharya v. Sabita AIR 1996 Cal 301.
[15] Laxmi Bai v. Ayodhya Prasad AIR 1991 p. 47; Krishnakant v. Reema AIR 1999 Bom. 127.
[16] Abayalla M. Subbareddy v. Padmamma AIR 1999 AP 19(FB); Soloman v. Jaini Bai AIR 2004 Mad. 460 (void marriage-second wife not entitled).
[17] JT 2004 (10) SC 366

of the marriage and is not a petition affecting marital status and thus, would not entitle the wife if such is void marriage to the relief of maintenance. The Court held that the words 'any decree' in Section 25 of the Hindu Marriage Act can't be construed to mean 'every decree' so as to entitle such spouse to maintenance. The Supreme Court has in the context of entitlement to a spouse of void marriage, now held that once there is a decree of nullity in respect of void marriage such spouse would be entitled to maintenance. The Court taking note of its earlier decision in. the *Chand Dhawan v. Jawahar Lai Dhawan*[18] held that decision clearly stipulated that once there is decree bringing about disruption of marital tie, including a decree nullifying a void marriage, the spouse was entitled to maintenance.

Section 25 of the Hindu marriage Act, 1955 applies on the disruption of the marriage tie, as explained and interpreted by Supreme Court in above decisions, whereas Section 18 of the Hindu Adoptions and Maintenance Act. 1956 applies in cases where the marriage Subsists and confers upon the wife the right to claim maintenance without seeking disruption and the marriage tie.[19]

In fact Supreme Court while analyzing the provisions of the Hindu Marriage Act, 1955 in *Ramesh Chandra Daga v. Rameskwari Daga*[20] stated where the marriage is not dissolved by any decree of the court, resort to Section 25 of the Hindu Marriage Act, 1955 is not allowed as any of the spouse whose marriage continues can resort to any other provision like Section 125 of Criminal Procedure Code, 1973 or Section 18 of the Hindu Adoptions and Maintenance Act, 1956.

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[18] JT 2004 (10) SC 366
[19] Supra Note: 1 p. 571
[20] JT 2004 (10) SC 366

It appears that though the Hindu Marriage Act, 1955, the second marriage during the life time of first wife, the present Sections does not clearly states that it is only the legally married wife who can claim maintenance in the above circumstance. If it had been the language of the Section the claim of the second wife would necessary fail.[21]

The Hindu Marriage Act, 1955, which prohibited bigamy, was enacted before the Hindu Adoption and Maintenance Act, 1956. The legislature therefore conscious of the fact that the Hindu marriage Act, 1955, prohibited of bigamous marriage, and yet the present Section, as it stands today had been enacted. It is submitted that if the legislative intent in the context of this Section were to grant the right of maintenance only to a legally married wife, it would have clearly stated so. It is worth while to note that maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 has been construed the beneficial piece of legislation. It also appears that the word 'husband' and wife in the context of this Section cannot be read to convey only a legally needed but be read as conveying the meaning of person who has undergone the ceremonies of marriage. The provision as it stands today is widely worded so as to sustain the claim of maintenance by second wife. The claim is maintainable irrespective of the fact that the other marriage had taken place after or before the marriage of applicant wife, provided the other wife is living.[22] The word any other wife living, in this clause are of sufficiently wide connection to include any wife other them the wife claiming maintenance under this Section. The meaning is not confined to a wife

[21] Supra Note: 1 p. 571-572.
[22] Ibid p. 572

who is junior to the wife who is claimant,[23] nor is it necessary that the husband and other wife should be living together. The word living here means alive and not living with the husband,[24] a Second wife who had abandoned her husband for no justifiable reasons and not for immoral purpose would be entitled to live separately from the husband by virtue of present clause, and claim maintenance under present Section.[25]

Clause (e) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with a ground which is "husband keeping a Concubine". A Hindu wife is also entitled to live separately from her husband and claim maintenance from him and the ground that he keeps a concubine in the same house in which she is living or habitually resides with a concubine elsewhere. In the second part of this clause, the emphasis is the 'habitually' and not so much on residence.[26] It is not necessary that the husband should have actually shifted his residence to the place where concubine lives.

Clause (f) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "husband ceased to be a Hindu by conversion".

A Hindu wife is entitled to live separately from her husband if he has ceased to be a Hindu. However, the terms Hindu in this clause must be understood in the wide sense given to it in Section 2 as will be seen from Subsection 3 of that Section. So husband continues to be a Hindu even though he may have been converted to any other of four religions:

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[23] Jagamma v. Satyanarayana Murti AIR 1958 All 582.
[24] Kalawati v. Ratan Chand AIR 1960 All 601
[25] Ram Prakash v. Savitri Devi AIR 1958 Punj. 87
[26] Kesar Bai v. Hari Bhan AIR 1975 Bom. 115

Hinduism, Buddhism, Jainism, Sikhism. Conversion in the present context implies that the husband has voluntarily relinquished his religion and adopted another religion after a formal ceremonial conversion; A Hindu does not cease to be a Hindu merely because he professes an ardent admirer and advocate of such religion and its practices.[27] However if he abdicate his religion by a clear act of renunciation and adopts the other religion, he would cease to be Hindu within the meaning of that clause.

Clause (g) of this Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is 'any other justifiable cause'. It is a residue clause; it runs, "if there is any other cause justifying her living separately". For seeking in the remedy under this clause the conduct of the husband should be such that, in the opinion of the court, the wife has 'grave and weighty' or grave and convincing reason for withdrawing from the society of the husband and it would amount to a justifiable cause. It is submitted that all those cases where the court may refer husband's petition for the restitution of conjugal right will be covered under this clause entitling a wife to claim separate residence & maintenance under this clause .[28] In *Sitbbegowda v. Hoonamma,*[29] wife claimed maintenance on the ground that husband treated her with cruelty and that he remarried and was living with second wife. The charge of cruelty was not established, but it was found by the court that husband was living with woman, having illicit relation with her and from which a child was born. Since marriage with this wife was not established, the case was not covered

[27] Supra Note: 1 p. 574.
[28] Kesar Bai v. Haribhan AIR 1974 Bom 115
[29] AIR 1984 Kant. 41

by clause (d) of Section 18(2). The court held that this was nonetheless a just cause for her to live separate and she was entitled to claim maintenance. The court took recourse to clause (g).

But according to Subsection (3) of Section 18, a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion.

(b) Evaluation of judicial pronouncements

Now, some landmark judicial decisions would be discussed here to clarify the application of these Sections in the matrimonial cases .First of all, we would like to discuss the application of Section 24 and Section 25 of the Hindu Marriage Act, 1955, then some cases would be discussed regarding the application of Section-18 of the Hindu Adoption and Maintenance Act, 1956. In *Hani v. Parkash,*[30] the question before the High Court was that in case of non compliance an order under Section 24 of the Hindu marriage Act, 1955, can be the defence of the defaulter. Husband obtained a decree of divorce against the wife on the ground of cruelty. She filed an appeal against it. During pendency of appeal, she sought maintenance and litigation expenses under Section 24 of the Hindu Marriage Act, 1955. The court decreed Rs. 500 per month as maintenance *pendente lite* and Rs.2, 200 as litigation expenses. The husband failed to comply with this order despite several notices over a period of two years. The court observed: "Law is not that powerless as not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to wife, his defence be struck out." The verdict of the High

[30] AIR 1964 P & H 175.

Court in this case shows that the purpose behind this is to ensure that a husband provides for the wife and children while the litigation is on. If he fails to do so, his defence will be struck out and the case will proceed.

In *Sushila Viresh Chhawda v. Viresh Nagsi Chhawda,*[31] the issue involved in this case was whether the litigation expenses and interim maintenance under Section 24 can be claimed, even when the main petition is for nullity of the marriage. Husband filed a suit for nullity of marriage under the Hindu Marriage Act on the ground of fraud. His allegation was that the wife suffering from a big ovarian tumour which had to be surgically removed along with an ovary just eight days after the marriage and this fact that the tumour was concealed at the time of marriage. The wife filed an application for interim maintenance under Section 24 of Hindu marriage Act. This was opposed by the husband on the ground that the marriage was void and the view of the fraud committed by her, she was not entitled to interim maintenance. The family court rejected the wife's application without even going into merits. Hence her special leave petition under Article 227 of the constitution. The High Court set aside the order of the family court. It was held that the wording of Section 24 the Hindu Marriage Act, 1955 is very clear that an application for maintenance can be filed in any proceeding under the Act, "When a fact of marriage is acknowledged and a proved, alimony follows subject, of course, to the discretion of the court in matter having regard to the means of the parties and it would be no answer to the claim. That the marriage was void ipso jure or was voidable." The court further remarked; "The direction of interim

[31] AIR 1996 Bom. 94.

alimony and expenses of litigation under Section 24 is one of urgency and it must be decided as soon as it is raised and the law take care that nobody is disabled from prosecuting or defending the matrimonial case by starvation or lack of funds". The purpose of Section 24 is to provide sustenance and financial assistance for pursuing the litigation. The provision is available in case of any proceeding under the Act and not confined to any particular proceeding.

In *Lataben Y. Goswami v. Yogendra Kumar S. Goswami,*[32] the issue before the Gujrat High Court was whether the husband can be absolved of the liability to pay arrears of interim maintenance to the wife, after allowing dismissal of this main petition under the Act? In the instant case, husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, whereupon the wife applied for maintenance under Section 24, Hindu marriage Act, 1955. The court allowed Rs. 200 per month as interim maintenance and Rs. 300/- towards litigation expenses. The husband challenged this but his application was rejected. He was given sufficient time for making the payment which he failed to do. He made no appearance on subsequent dates either in person or through counsel; hence the same was dismissed for non-prosecution. The wife filed an application for recovery of arrears of maintenance amount w.e.f., April 1, 1988 to August 5, 1993. The same was turned down as being not maintainable in view of the dismissal of the main petition of the husband. Hence, the wife's revision, it was argued on behalf of the wife that under the provision of Section 28(a) of the Hindu Marriage Act, all decree and orders made by it in any proceeding under the Act are enforceable in

[32] AIR 1996 Guj. 103.

the same manner as decrees and orders of the made in the exercise of its original civil jurisdiction. And further, it was contended that an order for alimony *pendente lite* remains in force during pendency of proceedings and in this case the proceedings under Section 9 for the restitution of conjugal rights remained pending till the application was dismissed on August 5, 1993 and so the wife was entitled to the arrears. After going through the contentions of both the parties, the wife's revision was allowed. The court observed 'That the finding of the learned trial court that the interim order passed in any proceedings would itself get extinguished or lost the sanctity with the ultimate fate of the main proceedings is perverse in the face of it. In case such interpretation is given, then the whole purpose enacting the aforesaid Section of the Act will be frustrated. Not only this, but it will be easy for a spouse who does not want to pay the amount of the maintenance or the cost of litigation despite the order of the Court to deny the same by allowing the dismissal of the petition for non-prosecution. Section 28A was substituted in the Act of 1955 to mitigate the hardships". Here it can be said that the decision is praiseworthy as the husband cannot be allowed to defeat the claim of the wife to the arrears of maintenance by simply dropping or not proceeding with the main petition. This would not only be unfair but also the defiance of court order.

In *Ghari Lai v. Surjit Kaur,*[33] the issue before the High Court of Jammu and Kashmir was under Section 5 of the Limitation Act, 1963 for condonation of delay be termed as proceedings for purposes of Section 24 of the Hindu Marriage Act, 1955.In that case the husband obtained an ex-parte restitution decree against the wife. The wife filed

[33] AIR 1997 J & K 72.

an application for setting aside the same after the period of limitation had expired. She also filed an application under Section 5 of the Limitation Act for condonation of delay. Pending this application, she filed an application under Section 30 of the J & K Hindu Marriage Act (4 of 1980) for maintenance. This Section of the J&K Act in pari material with Section 24 of the Hindu Marriage Act, 1955) The husband objected to her application on the ground that proceeding under Section 5 of the Limitation Act could not be considered as proceeding for purpose of grant of maintenance. His plea was, however, rejected. Hence, he appealed. The husband's appeal was admitted. The High Court reiterated the decesion on *Puran Chand v. Kamla Devi*[34] where it was held that maintenance is awardable on monthly basis "during the proceeding which connotes that maintenance is admissible from the time of commencement of the proceedings till their termination. According to the court proceeding in trial court would naturally commence from the date on which issues are framed and since there can be no stage of framing of issues in an application seeking condonation of delay in proceedings under Section 5 of the Limitation Act, Section 30 of the J&K Hindu marriage Act cannot apply. Accordingly, the court held that application for condonation of delay was not a proceeding within the meaning of Section 30 of the J&K Hindu marriage Act (or Section 24 of the Hindu Marriage Act). While conceding that this provision seeks to help a litigating spouse who does not have sufficient means to maintain himself/herself, the court observed that provision cannot be used in such a way that it acts as a weapon of sword for harassment of the other party.

[34] AIR 1981 J&K 5.

Virtually the strict interpretation of the provision can work hardship on the party sometimes. Supposedly wife obtains an ex-parte order and the husband files an application for setting aside and condonation of delay for seeking restoration of the order only to harass the wife, would the court deny her expenses to fight out the application? Each case needs to be decided on its own facts and circumstances.

In *Amit Kumar Sharma v, VIth Addl. District and Session Judge, Bijnor*[35] the issue before the Allahabad High Court was whether a husband's mother's needs be taken care of in a wife application for maintenance when the mother is staying with her? In that case the husband filed a petition for divorce. Thereupon, the wife filed application for maintenance under Section 24 and 25 of the Hindu Marriage Act, 1955, claiming maintenance for herself, two minor children and ailing mother of the husband who too was staying with her. The same was allowed by the trial court and affirmed by the additional district judge in appeal. The husband filed an appeal against the order. The court held that Section 24 contemplates maintenance either to wife or husband and the mother is in no way connected with us relating to marriage between the husband and wife. The court observed that the Indian social fabric involves maintenance of parents with religious scruples and devotion but the court is called upon to interpret the law and not religious or social duties. Section 125 of the Cr. P.C. and Section 20 of the Hindu Adoptions and Maintenance Act are there to take care of the Parents maintenance rights according to the court. The court further held that where there is specific provision of law on the basis of religious scruples or social system, it could not be

[35] AIR 1999 All 4.

permissible to stretch Section 20 of the Hindu Adoption and Maintenance Act, 1956, nor it can overlap the said Sections. Section 24 of the Hindu Marriage Act, 1955, does not postulate the scope of granting maintenance to the mother of the husband even when she is ailing and lives with the applicant. Maintenance award in favour of the mother was accordingly set aside by the High Court.

On evaluation of this decision of High Court it may be pointed out that here the court has taken a very rigid and technical view. Further, while awarding maintenance in an application the court considers, *inter alia,* the needs of the applicant. Besides, under Section 25 "any other circumstances of the case" is a relevant consideration. When the husband's mother, whom in any case he is liable to maintain, is staying with his estranged wife, who is taking care of her needs, including medical treatment, the court should have given due consideration to these needs rather than driving her (the mother) to file separate suits for maintenance under the provision of the Cr. P.C. or Hindu Adoption and maintenance Act, 1956.

In *Meshchandra Rampratapji Daga v. Rameskwari Rameshchandra Daga,*[36] the Bombay High Court has held that the wife is not entitled to maintenance if the marriage is void. The observations of the court in *Krishnakant v. Reena,*[37] were referred to "that the Hindu Marriage Act, 955, is a piece of social welfare legislation regulating the marital relations of Hindus consistently with their customary law, i.e. Hindu law. The object behind Section 24 of the Act providing for maintenance *pendente lite* to a party in matrimonial proceeding is

[36] (2001) 1 Femi-Juris CC 60 (Bom)
[37] (1999) 1 Mah. LJ 388.

obviously to financial assistance to the indigent spouse to maintain herself during the pendency of the proceedings and also have sufficient funds to carry on the litigations so that the spouse does not unduly suffer in the conduct of the case for want of funds. The words 'wife' or 'Husband' used in Section 24 of the Act include a man and a woman who have gone through the ceremony of Hindu marriage which would have been valid but for the provisions of Section 11 read with clause (i) of Section 5 of the Hindu Marriage Act,1955. These words have been used as convenient terms to refer to the parties who have gone through a ceremony of marriage whether or not that marriage is valid or subsisting, just as word marriage has been used in the Act to include a purported marriage which is void *ab initio"*.

In *Padmavathi v. C. Lakshminarayana,*[38] the question before the Karnataka High Court was whether the mere fact that the wife being educated is capable of earning, defeat her claim for maintenance under Section 24 of the Hindu Marriage Act, 1955. It was held by the High Court that the only condition for granting maintenance under Section 24 is that the applicant has no independent income sufficient for support. The court observed that the object of Section 24 would be defeated if the interim maintenance is denied during the matrimonial proceedings on the ground that the wife is capable of earning her living because of her qualification. It further remarked by the Court that the reasoning of the family court judge was "not only contrary to settled legal position but the spirit and purpose of Section 24 of the Act". The decision seems to be correct that the mere fact that the wife is capable of earning, without any contention or proof that she is in fact earning,

[38] AIR 2002 Kant 424

does not disentitle the wife to claim maintenance under Section 24 of the Hindu Marriage Act, 195 5.

In *R. Suresh v. Chandra,*[39] *the* court has elucidated the concept and meaning of term support in Section 24 of the Hindu Marriage Act, 1955, and held that the expense incurred on medical treatment would also be covered in the word 'support' It was held that since the word "support" in Section 24 of the Hindu Marriage Act, 195 5, was not defined, it should be given dictionary meaning or as understood in general parlance. Further, the court can draw inspiration from the word "maintenance" as defined in Section 3(b) (i) of the Hindu Adoption and Maintenance Act, 1956, which includes provision for food, clothing, residence, education, medical attendance and treatment. Though this definition too is not exhaustive but only inclusive, medical attendance and treatment have been specifically mentioned. Referring to *Pradeep kumar Kapoor v. Shailja Kapoor,*[40] it was held that the word "support" and "maintenance" are synonymous and the definition of "maintenance" as given in the Hindu Adoptions and Maintenance Act, 1956, equally applies to the word "support" in Section 24 of the Hindu Marriage Act, 195 5. As far as the point reimbursement from office was concerned, the court held that the issue is not of *his* reimbursement from office but the wife's claim for reimbursement from him. The wife was, accordingly, held to be entitled for reimbursement of her medical expenses from the husband under Section 24 of the Hindu Marriage Act, 1955.

In *Ramesh Babu v. Usha,*[41] the issue before the Court was that whether

[39] AIR 2003 Kant 183
[40] AIR 1989 DEL. 70
[41] AIR 2003 Mad. 281.

the applicant who is entitled to free legal aid, can seek litigation expenses under Section 24 of the Hindu Marriage Act, 1955. In the instant case, a husband filed a petition for annulment of marriage. The wife claimed interim maintenance and litigation expenses under Section 24 of the Hindi Marriage Act, 1955. The family court ordered Rs. 2,500/- towards litigation expenses and Rs. 1,250 per month as interim maintenance. Both were dissatisfied and filed appeal against the maintainability of the litigation expenses and the wife against inadequacy of the amount of interim maintenance. The husband's argument was that the wife was entitled to free legal aid and, therefore, he was not liable to pay her litigation expenses. The court, however, did not accept this argument and held. Though free legal aid is available however, I am of the view that on this ground the claim of the deserving person cannot be rejected. The amount of interim maintenance was also raised from Rs. 1,250/- to Rs. 3,000/- per month as the wife had no independent source of income and the carry home salary of the husband was assessed at around Rs. 9,000 per month. To deny litigation expenses under Section 24, only on the ground that legal aid available to the applicant is not justified, as was done by the Gujarat High Court in *K.K. Desai v. A.K. Bhai Desai.*[42] In this case the court rejected a wife's claim for litigation expenses on the ground that she can avail free legal aid which is provided by the state. According to the court, in that case, the burden cannot be put on the husband merely because the wife was ignorant of her right to avail legal aid. The view adopted by the court in *Ramesh Babu* is more realistic and logical.

[42] AIR 2000 Guj 232.

In *S.S. Bindra v. Tarvinder kaur,*[43] the court had to determine that in a claim for maintenance *pendente lite* what is the crucial time for assessing the income of the non-claimant - time of petition of claimant or time of order. Here the Court held that in in awarding interim maintenance, one of the considerations is that the wife and children shall enjoy the same standard of living as the husband, but emphasized that "the intention was not to peg it or freeze it to the date of separation". If in term, orders are to be pegged to a particular point in time then if income of the earning of the spouse were to suffer a drastic reduction for any reason including deterioration in his/her health, the court would be precluded from making any adjustment because of these factors. According to my perception a very logical interpretation indeed. If the income of the husband increases manifold between the time of the application and order of the judge should not be precluded to fix the amount in that basis; and so also if it decreases. It should not be left to the claimant or non-complainant to file fresh application for reassessment.

In *Chandra Guha Roy v. Gantam Guha Roy,*[44] the issue that whether an educated young lady should be expected to be capable of maintaining her own self or not. In that case, a husband filed a petition for divorce and the wife applied maintenance under the Section 24 of the Hindu marriage Act, 1955 and also under the Section 125 of Cr. P.C. thereafter, the husband also filed an application under Section 24 of the Hindu Marriage Act, 1955. The applications of both the parties were dismissed by the trial court. Against the wife's application, it was held that the husband was no longer in service as, consequent to his arrest

[43] AIR 2004 DEL 242.
[44] AIR 2004 Jhar 36

after wife's criminal complaints against him, his services were terminated. The court further observed that it was a settled principle of law that an educated lady can not be encouraged to sit idle expecting any allowance from the husband. The wife filed an appeal against the order. It was held that the ground for rejection of the wife's application was not proper. The income of the husband must be his special knowledge; he did not make any attempt to prove either his actual income or his dismissal from job, besides, when his application for maintenance was rejected he did not challenge the same and this implied that he was not prejudicially affected by the order. Above all, according to the court, the husband had filed the divorce suit which also incurred expenditure which goes to show that he did have some income. In view of all these facts, the matter was remanded for fresh trial. According to my point of view in our times of equality, a wife is as much liable to maintain her husband as the husband is to maintain his wife -depending on the circumstances of the case. However, the trial court's observation in this case that an educated young lady cannot be expected to sit idle expecting allowance from the husband, did not find favour with the High Court. There can, however, be no hard and fast rule in this respect and each case would have to be decided on its own fact and situations.

Now, some cases with regard to the permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955 would be analyzed. In *Chand Dhawan v. Jawaharlal Dhawan,*[45] the issue before the court was: Do the term "any decree" in Section 25 of the Hindu Marriage Act include an order of dismissal of the petition? The

[45] (1993) 3 SCC 406

parties were married in 1972 and had three children. In 1985, a petition for divorce by mutual consent was filed in the purported to have been filed jointly by the consent of both the spouse as per the requirement of Section 13(b) of the Act. The petition was kept pending for six months. On coming to know of the petition, the wife filed objections. According to her she never consented to the divorce and the husband had duped her into signing some blank paper on a false pretext, which he used in the petition. However, some understanding was arrived at, under which the wife agreed to join the husband. Both the parties gave a joint statement and the divorce petition was got dismissed. Barely three months later, the husband filed a divorce petition on several ground. Wife's is application under Section 24 for litigation expenses and maintenance *pendente lite,* which was granted. Since the husband did not make the payments, the divorce proceeding was initiated by him were stayed under order of the High Court of Allahabad. The wife filed a petition under Section 25 for grant of permanent alimony on the ground that she was facing starvation whereas the husband was a multimillionaire. She also filed a petition under Section 24 for maintenance *pendente lite* and litigation expenses. The Additional District Judge allowed her petition and granted a sum of Rs. 6,000 as litigation expenses and Rs 2,000/- per month as alimony *pendente lite* from the date of application. The husband *filed a revision petition against it in the High Court; the wife also* approached the court seeking enhancement of the amount. Both the revision petitions were referred to a larger Bench. The husband's objection was that the wife's application was not maintainable since there was no decree under the Act, and in the absence of "any decree" no order under Section 24 or 25 of the Act could be passed. This objection was sustained whereupon

wife filed an appeal in the Supreme Court. The issue was whether the words any Section 25 includes an order of dismissal of petition. Reference was made to several cases. Some courts held that permanent alimony can be granted only when any decree and the relief sought is given, if the relief is not granted then it means that there is no decree and in such situation maintenance cannot be awarded. On the other hand, there were cases supporting the argument that the words "passing any decree" imply both the allowing and dismissal of the main petition. After an analysis of the case law, the Supreme Court came to the conclusion that the wife's application for maintenance was not maintainable as the wife had withdrawn her consent to the divorce petition and the same was dismissed. An order of dismissal of a petition does not disturb the marriage not confers or takes away any legal character or status.

According to the court that without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act, 1955, the claim of permanent alimony was not valid as ancillary or incident to such affection or disruption. The wife's claim for maintenance under the Hindu Marriage Act, 1955 was dismissed. The court held that the wife's claim in such a situation can be agitated under the Hindu adoption and maintenance Act, 1956 since Section 18(1) if this Act entitles a wife to maintenance even with any disruption in her marital status. It observed that like a surgeon, the matrimonial court, if operating assumes the obligation of the post operatives and when not leaves the patient to the physician. This judgment is bound to create problems for wives whose husband want to get rid of them and file petition which for whatever reasons get dismissed. The dismissal of the

petition only goes to show that the case of the husband against the wife is unfounded. What is the fault of the wife in such case? Secondly while Hindu Adoption and Maintenance Act where a wile can seek maintenance even without any disruption of her marital status what about woman from other communities. They have to bank upon the provision of the Cr.PC.

In *Ashabi B. Takke v. Bashasab Takke,*[46] the issue before the Karnataka High Court was that whether a wife's refusal to join her husband who has remarried sufficient justification for her withdrawal from him and claiming maintenance. The High Court held question of the wife deserting the husband or the husband deserting the wife pales into insignificance in the light of this development. The fact that the wife could not get maintenance earlier under Section 125 of Cr. PC proceeding also cannot have any hearing in a suit for maintenance file subsequent to the defendant husband having contracted a second marriage. This is so even if the personal law of the defendant permits him to contract more than one marriage. The second marriage of the husband *per se* is sufficient justification for a wife to leave him and claim maintenance. When that is proved, nothing else needs to be established.

In *Bhau Saheb v. Leelabai,*[47] there were two main issues which had to be settled by the court:(i)Whether an order dismissing a wife's petition seeking declaration that her marriage was valid can come under the term "any decree" so as to entitle her to claim maintenance under Section 25 of the Hindu Marriage Act,1955. (ii) Whether a wife whose

[46] AIR 2003 Kant 172
[47] AIR 2004 Bom. 283 (FB)

marriage is void, is entitled to maintenance. The facts of the case was that shortly after marriage, the wife filed criminal case under Sections 498A, 323, and 506 of the penal Code against the husband. She also filed case for maintenance under Section 125 of the Cr. P.C. this was dismissed by the family court on the ground that she was not the legally wedded wife of the opposite party. Meanwhile she filed an application before the family court seeking declaration that the marriage was valid and the child is legitimate. Along with that she sought maintenance for the daughter. Her petition seeking declaration regarding validity of the marriage was dismissed by observing that she was not legally wedded wife since her husband was an already married man. Maintenance, however, was granted in favour of the child. In the backdrop of this legal battle she filed a petition under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony which was allowed by the family court and the husband was ordered to pay Rs. 1,000 per month to the wife w.e.f. the date of application. The family court drew support for its order from several judgments. The husband appealed against the family court order. He denied solemnization of marriage and in the alternative claimed that he was already married on the alleged date of marriage with the petitioner and so the marriage if any, was void in view of Section 5(i) read with Section II of the Hindu Marriage Act, 1955, and so the "wife" was not entitled to any maintenance. The court pointed out that conduct of the parties and also other circumstances of the case are important consideration and they cannot control the discretion conferred upon the court by the expression "court may", If there can be cases of denial of maintenance to even legally wedded wife the liberal construction of Section 25 so as to entitle an illegitimate wife to maintenance would not be proper.

According to the court, it is a fundamental principle of law that in order to claim a relief from the court of law, there must be a legal right based on a legal status. When status of a woman as wife is not recognized by the provisions of the Act which confers the right of permanent alimony, she cannot be entertained for grant of relief in the absence of recognition of her status by the Act. If the construction of the word "wife" is not accepted uniformly for the same remedy provided in special legislation *i.e.,* Section 125 of Cr, P.C. and personal law, anomalous position may occur, in personal law. The court observed: "Even while considering Section 25 to be a "welfare legislation", it cannot be ignored that a liberal construction although may benefit the second wives who are drawn into the form of marriage by keeping them ignorant about illegitimacy of the same, may encourage bigamous marriage with preventing bigamous marriage". Further the court made a distinction between a marriage which is void and one which is voidable. The court may consider granting of maintenance while declaring the nullity of a voidable marriage as the relationship would be legal in law until annulled, but not in case of nullity of marriage which is void *ipso jure.* The wife lost her case. The court held that any decree would not mean every decree so as to entitle a wife to claim maintenance; and further that wife of a void marriage is not entitled to maintenance. That absolving a husband of the liability to maintain his second wife who was kept in the dark about the fact of his first marriage would encourage, rather than discourage a man to enter into such bigamous marriage. A wife would rarely enter into a marriage with an already married man with full knowledge of this fact simply because she would not be denied maintenance.

In *Geeta Satish Gokarna v. Satish Gokarna,*[48] the issue before the Court was: Can a wife under a consent decree agree to give up to her claim for any maintenance in future and would this debar her from claiming any maintenance from her husband thereafter? In the instant case, a marriage was dissolved by mutual consent of the parties and as one of the terms of the consent decree, the wife agreed not to claim any maintenance/alimony from the husband. However, after two years of the decree, she filed an application under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony at the rate of Rs. 25,000/- per month from the date of application. The trial court held that the wife's application of maintenance despite the consent clause where under it was agreed that "the petitioner [wife] will not claim any maintenance or alimony in future from the respondent [husband]". Accordingly, it ordered the husband to pay Rs. 2,000 per month as maintenance to the wife. Both the parties appealed - the wife against the quantum and the husband against the very maintainability of the wife's claim. The appeals were dismissed. The High Court found no material on record which could justify enhancement of the amount in favour of the wife, and as to the husband's objection, it held that the power to grant maintenance has been conferred on the court by parliament under the Act and the parties cannot, by agreement, oust the court's jurisdiction. The court further stated that permanent alimony and maintenance are a larger part of the right to life. These provisions according to the court are included "to enable a person unable to maintain her/him to be protected. Therefore, any clause in a contract or consent terms providing to the contrary would be against public policy". The principle is that where on grounds of public policy, wife

[48] AIR 2004 Bom. 345

cannot enter into such contract then the contract is void and the court will take no notice of that and ignore that part of the order though it was made by consent because as remarked by *Lord Atkin* 'the wife right to future maintenance is matter of public concern which she; cannot barter away." An agreement in a consent decree not to claim maintenance cannot close the doors for a wife's claim of maintenance thereafter. Maintenance has been construed as an integral part of right to life. The decision is good as it cannot be denied that maintenance is an integral part of right to life; one really wonders whether it is fair to allow a consenting party to retract. The view taken by the court has the potential of discouraging mutual settlement of issues and consent divorce since consent agreements are package where parties agree to barter certain rights and claim to buy peace. If term and conditions of the consent agreement are fair and reasonable the courts should honour such agreement and discourage retraction.

In *Surendra Kumar Bhansali v. Judge, Family Court,*[49] the issue was whether an application under Section 25 of the Hindu Marriage Act, 1955, maintainable while an appeal against divorce is pending. High Court held that an application, under Section 25 can be made of passing of the decree or at any time subsequent thereto. In this case, since the divorce petition by the husband was decreed and the marriage dissolved, the wife's application was held to be tenable. According to the court, the relief could have been refused if the main petition had been dismissed as per the decision of the Supreme Court in *Chand Dhawan v. Jawaharla Dhawan,*[50] but not simply because an appeal against the divorce decree was pending. The decision is right which

[49] AIR 2004 Raj 257
[50] 1993 3 SCC 406

declares that an appeal against a decree of divorce does not disentitle a party from filing an application for maintenance under Section 25 of the Hindu Marriage Act, 1955. Such application, in terms of the provision of Section 25, can be filed at the time of the passing of the decree or at any time subsequent thereto. An appeal against the decree does not take away this right.

In *Sudha Suhas Nandanvankar v. Suhas Ramrao Nandanvankar,*[51] the issue was: Can a wife whose conduct demonstration that she is trying to take advantage of her own wrong or fraud to harass the husband. The parties were married in 1995 according to Hindu rites. The marriage was annulled by a decree of nullity in 1996 on the ground that the wife was suffering from epilepsy at the time of marriage which fact was not disclosed to the husband and hence a fraud was committed on him [prior to the Marriage Laws (Amendment) Act, 1999 epilepsy was a ground on which a marriage could be avoided and decree obtained under Section 11, coupled with Section 5(ii) (c) of the Hindu Marriage Act, 1955. The word epilepsy in Section (c) of Section (5(ii) has now been deleted.] Even though the decree was *ex parte,* it was not challenged by the wife. However, after the decree the wife first claimed return of articles which were presented to her by her parents at the time of marriage. Further, she claimed expenses incurred at the marriage. During pendency of this application she again submitted application for articles and jewelry presented to her by her in-laws at the time of marriage. She further claimed permanent alimony. The wife's application was partly allowed by the family court. Hence, she files an appeal in respect of part rejection of her application. The main

[51] AIR 2005 Bom 62.

issue for consideration was in respect of alimony claimed by her. The court of nullity conceded that a wife is entitled to claim alimony even though a decree of nullity is passed at the instance of the applicant. This, however, according to the court is not an absolute right. If a wife's conduct is such that the court feels that she should not be granted maintenance, the court may refuse her application. In this case, according to the court the nondisclosure by the parents of the appellant and the appellant's accepting the decree as it is, without making any grudge in respect of the ground that the appellant was suffering from epilepsy prior to the marriage reflects upon the conduct of the applicant, and if we take into consideration this aspect what we find is that the appellant is trying to take advantage of her wrong or fraud and is trying to harass the respondent by claiming the amount of alimony". And further, the court held "What we find is that after a decree of annulment, the respondent has married and he is having a child. Now this appears to be an attempt on the part of the appellant and her parents to disturb the marital life of the respondent which he has tried to settle after annulment of the marriage. This is an attempt to shift the liability of maintenance by the appellant wife on a husband who was not fault and who has not consummated the marriage. Even though the law permits the right of alimony in favour of the appellant, however, the conduct and circumstances involved in the present case does not permit us to pass an order of permanent nature in favour of the appellant". The wife's appeal was, thus, dismissed.

Now some cases relating to the Section 18 of the Hindu Adoption and maintenance Act, 1956, will be discussed. In *Ranjit Kumar*

Bhattacharya v. Sabita Bhattacharya,[52] the issue before the Court was: Is a married woman who lived with a married man as his wife, entitled to damages because she, not being a legal wife is not entitled to maintenance? Facts of the cases were that a married man lived with a woman for several years including her to believe that she was his wife, and also had children from her. Later they fell apart. The woman filed a suit for maintenance under the Hindu Adoption and Maintenance Act, 1956, and also under Section 125 of Criminal Procedure Code, 1973. The man denied marriage and his liability to maintain her. The additional District and session judge held that in view of long and continuous co-habitation between the parties, there was a strong presumption of marriage and that mere absence of proof regarding marriage rites could not dislodge the presumption unless there was proof of in surmountable obstacles to a valid marriage. A decree of maintenance for Rs. 500/- per month was passed. Hence, husband appeal. It was argued that Section 18 of the Hindu Adoptions and Maintenance Act, 1956, makes no provision for maintenance from a 'husband' with whom a woman has entered into a void marriage. The Contention was accepted by the court and it was held that the woman was not entitled to maintenance. The Court, however, ordered the man to pay damages. According to the court, it is obvious that the man must have induced her to believe that she is his wife: for such immoral activities, the applicant should not be spared altogether, though the damage that had been caused, both physically and mentally, could not be compensated in any way," the court remarked. He was, accordingly, directed to pay Rs.30000/- by way of damages. This case is yet another example of how a woman can be defrauded and entrapped into a

[52] AIR 1996 Cal. 301

relationship and the man can just get away because under the law they are not husband and wife. There is a need for a law which should impose liability on such erring males who defraud women into a legally void marriage only to abandon them later and then take advantage of their own illegal/immoral act. As rightly remarked by the court on this case, no amount of damage can compensate the damage caused to the woman.

In *Boummma v. Siddappa Jeevappa Patarad,*[53] the main issue was whether "an arrangement to live separately" be treated as a "divorce deed". The facts of the case were that a wife filed an application for maintenance under Section 18 of the Hindu Adoption and Maintenance Actl956. The parties were married in 1966 and the claim was made by the wife in 1995. She claimed past maintenance also. She pleaded desertion and alleged that the husband had another wife and they both ill treated her and threw her out of the house. The husband resisted the application on the ground that their marriage had been dissolved by consent as per "an arrangement to live separately", and in terms of the provision of Section 18 of the Hindu Adoptions and Maintenance Act, 1956, a claim for maintenance can be made only when their is subsisting marriage. The trial court held that there was no maintenance under the provisions of the Hindu Adoptions and Maintenance Act. Hence the wife appeals, it was held by the court that the second marriage by itself is desertion of the wife and that fact having been proved; no further proof of desertion was required. Besides, "an arrangement to live separately", even assuming that it is proved, could not have the effect of bringing the marriage to an end. Such agreement

[53] AIR 2003 Kant 342

was, allegedly, entered into long after the enactment of the Hindu Marriage Act, 1955. According to the court "a marriage in law can be dissolved only by a, method recognized in law and not otherwise". The so-called arrangement sought to be passed off as a divorce-deed" could not, firstly, be treated as a divorce, and secondly, after the coming into force of the Hindu Marriage Act, 1955, a marriage could be dissolved only under the provisions of the Act, of exceptionally, under custom permitting divorce. In this case there was no assertion by the husband that there was a divorce under a customs prevalent in the community to which they belonged. The marriage was thus held to be subsisting and the wife's claim tenable and bona fide. She was, however, not entitled to past maintenance but only to maintenance with effect the cast of her application. In *Sheela Rani v. Jagdish Chander Sharma.*[54] It was held that the right of residence as part of maintenance is a personal right of the wife.

(c) Identification of Pitfalls

The Hindu marriage Act, 1955 is social welfare legislation. It was with this end certain rights were conferred on Hindu women by the Act, Therefore, such a piece of legislation should be constructed by adopting progressive and liberal approach and not a narrow and pedantic approach. However, there is some judicial pronouncement which shows the strict behaviour of Judiciary toward the aggrieved spouse. In the matter of implementing the provisions of Act, the technicalities of the provision must be left to some extent. This view was adopted by the High Court of Calcutta in *Sisir Kumar v. Sabita*

[54] AIR 2004 Del 158

Rani.[55]

"The word 'Wife' or 'Husband' in Section 25, has been used as convenient terms to refer to the parties to a marriage whether or not the marriage was valid or subsisting. Marriage had been used to include a purported marriage which was void *ab initio".*

Here it is also a noteworthy fact which was discussed in *Amit Kumar Sharma v.* VI[th] *Add. District Session Judge Bijnor,*[56] that whether a wife can also seek maintenance for husband's mother who need to be taken care of under the same application for maintenance under Section-25 when mother is staying with her? Here court has taken a very rigid and technical view and ordered the old mother to file separate claim under Criminal Procedure Code, 1973 or under Section 20 of the Hindu Adoption and Maintenance Act, 1956. While awarding the maintenance in an application the court must consider, *inter alia,* the needs of the applicant. When the husband's mother is staying with the estranged wife, the court should have given consideration to those needs rather than driving her (the mother) to file separate suits for maintenance under Cr. P.C or the Hindu Adoption and Maintenance Act, 1955.

The another pitfall which may be noticed is that in some cases the husband has tried to be absolved of the liability to pay the arrears of interim maintenance to the wife after allowing dismissal of the main petition under the Act, e.g. in *Lataben Y, Goswami v. S. Goswami,*[57] that has been discussed earlier in this project. Here the court noticed

[55] AIR 1972 Cal.
[56] AIR 1999 All
[57] AIR 1999 Guj.

the husband's trick and wife was found entitled to the arrears. The husband was not allowed to defeat the claim of wife to the arrears of maintenance by simply or not proceeding with the main petition.

Another point of discussion regarding the identification as pitfalls in the application of the provisions of Hindu law is in *Ramesh Babu v. Usha.*[58] In the instant case, the husband denied the maintenance of wife on the ground that the wife is entitled to free legal aid The Court refused the argument of husband and awarded maintenance to wife. The court caught the trick of husband and gave relief to wife.

In some cases the husband contended against the maintainability of wife's claim of maintenance under the Hindu Marriage Act, 1955 on the ground that wife gave up her claim under consent decree for maintenance in future, e.g. in *Geeta Satish Gokarna v. Satish Gokarna.*[59] This case came before Bombay High Court, the court, however, refused to accept the husband's argument and held that "An agreement in consent decree not to claim maintenance cannot close the doors for a wife to maintenance thereafter".

The other loophole in the Act is that there is no legislative provision regarding maintenances to the place of filing of petition or jurisdiction of court. In the absence of the specific provision regarding this matter the provisions of CPC is applied, In *Sucha Dilip Ghate v. Dilip Shanta Ram Ghate,*[60] the issue was: can a maintenance petition by wife under the Hindu Adoption and Maintenance Act, 1956 be filed at a place where wife resides. Here Section 20 (c) of CPC was applied and was

[58] AIR 2003 Mad.
[59] AIR 2004 Bom. 345
[60] AIR 2003 Bom. 390

held where petitioner resides.

In *Popri Bai v. Teerath Singh*[61] this case was explicit example of how unscrupulous husbands try to harass their wives and use the process of court for achieving this. The court noting the tricks of the husband with regard to the alimony *pendente lite* under Section-18 of Hindu Adoption and Maintenance Act, 1956, ordered the maintenance from the date of application and not from the date of the order. Thus, there is some pitfalls in the Hindu Law regarding the maintenance of wife which have already been pointed out. As the maintenance of the women is a very sensitive issue, so, it must be handled in a careful manner, it must be paid sharing the due regard to the intention of the legislature.

(d) Advocacy for Reforms and Improvements

It is a well known fact that Hindu Marriage Act, 1955 is social welfare legislation. The judiciary must always while interpreting its provision, keep in consideration its social welfare nature. A liberal approach must be adopted in the interpretation of its provisions.

It is also necessary that the tricks of the spouses, for avoiding the charge to maintenance must be noticed timely so as to implement the Act sharing the true intention of legislature for its enactment.

Right of a wife to maintenance where a marriage is void had always been controversial. An amendment in law is in offing where the simple fact of the parties having gone through a ceremony of marriage would be enough to entitle the wife to maintenance.

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[61] AIR 2004 Raj. 128

It is also a remarkable point that a subjective approach in order to avoid the grant of relief must not be allowed by a court.[62] The denial of maintenance under Section-25 of Hindu Marriage Act, 1955, was due to the concealment of her epilepsy by the wife before marriage on the already obtained annulment. Here I am not justifying "wrong", "misconduct" or "fraud" on the part of any spouse but only indicating how subjective approach can lead to varying interpretations in order to deny or granting a relief. *Bakul Bai v. Ganga Ram*[63] case the fraud is serious but the victim is the wife only. Thus the court, while deciding this type of matrimonial case, must always take into consideration that the aim of the enactment should not be frustrated. To avoid the confusion regarding the maintenance as has been discussed in *Geeta Satish Gokarna v. Satish Gokarna,*[64] there must be insertion of the provision by the legislature regarding the nullification of consent agreement not to claim maintenance in future as the maintenance has been construed as an integral part of right to life.

The Hindu Law is social welfare legislation and beneficial in nature, it has been enacted in comprehensive manner so, it would be unfair not to have the specific provision regarding the place of filling of petition or jurisdiction of the court. There must be some specific provision regarding that to face the problem raised in *Sucheta Dilip Ghate v. Dilip Shanta Ram Ghate.*[65] The insertion of the specific provision regarding the place of filing suit will cause the great help in avoiding confusion and will reduce the delay in deciding cases.

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[62] Sudha Suhas Mandan Vankar v. Suhas Ramrao Nandan Vankar AIR 2005 Bom.
[63] 1988 1 Scale 188.
[64] AIR 2004 Bom. 345
[65] AIR 2003 Bom. 390

4.3 MAINTENANCE OF WIFE UNDER MUSLIM LAW

(a) Analysis of Legislative Provision

The rules regarding the maintenance of Muslim wife has been given in *Sharia.* According to the ordinary sequence of natural events, the wife comes first. Her right of maintenance is absolute. Her right remains unprejudiced even if she has property or income of her own and the husband is poor. A husband is bound to maintain his wife, irrespective of being a Muslim, non-Muslim, poor or rich, young or old if not young to be unfit for matrimonial intercourse. In addition to the legal obligation to maintain, there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-i-pandan, guzara, mewa-khori,* etc. The husband is bound to maintain if she fulfils the following conditions: (i) She has attained puberty, i.e., an age at which she can render to the husband for his conjugal rights;(ii) She places and offers to place herself in his power so as to allow free access to herself at all lawful times and obeys all his lawful commands. It is to be noted that a Muslim wife is not entitled to maintenance in certain conditions. These conditions are: (i) If she abandons the conjugal domicile without any valid cause; (ii) If she refuses access to her husband without and valid cause; (iii) If she disobedient to his reasonable commands; (iv) If she refuse to live with her husband without any lawful excuse; (v) If she has been imprisoned; (vi) If she has eloped with somebody; (vii) If she is a minor on which account marriage cannot be consummated. (viii) If she deserts her husband voluntarily and does not perform her marital duties, and (ix) If she makes an agreement of desertion on the second

marriage of her husband.

The wife's right to maintenance ceases on the death of her husband, as in this condition her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the *Iddat* of death. But under Muslim Law, a divorce wife is entitled to be maintained by her former husband during the period of *Iddat,*

Now after discussing the maintenance of Muslim wife during the subsistence of marriage, it is planned to discuss the maintenance of Muslim divorcee and controversy between the provisions of Criminal Procedure Code and the Muslim Personal Law on the point of maintenance of Muslim divorcee. It is pertinent to note that under classical Islamic law, a divorcee is entitled to get the maintenance provision but the same will continue till the expiry of the period of *iddat.* There is controversy between the classical rules of Islamic Law and provisions of Criminal Procedure Code regarding maintenance. The controversy arose when British India took a legislative step to regulate the institution of maintenance of wife, under Section 488 of the old Criminal Procedure Code, 1898, the husband might be compelled to make a monthly allowance not exceeding Rs. 500 per month as maintenance to his wife. But the wife's right to maintenance under this Section could be defeat by the husband by obtaining the divorce under the personal law. The provision under Section 488 of the old Criminal Procedure Code, 1898 was very much in the line with the sprit of Islamic law, where it furnished a speedy remedy for securing maintenance to all Indian wives neglected by their husband on certain grounds including bigamy. In several cases the separate maintenance orders were granted in favour of the wives, but in many cases where a

maintenance order under Section 488 of Criminal Procedure Code, 1898 were granted to Muslim wife, her husband subsequently divorced her by *Talaq,* consequently the maintenance order so granted ceased to be effective after the expiry of *iddat* period as per the rules of Muslim law. This situation caused hardship and opened the gate for a long battled between the *Sharia* on one side, Criminal Procedure and the Indian courts on the other. To remove conflict, the joint committee recommended that the benefit of the provisions should be extended to a woman who has been divorced by her husband and it should continue so long as she has not been remarried after the divorce. Accordingly, the uniform law of maintenance was introduced to all citizens of India through the amendment in criminal procedure code in 1973. Accordingly, clause (b) of explanation to Section 125(1) was enacted, which laid down that for the purpose of maintenance "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried, however, Section 127 (3)(b) was added to provide protection to Muslims and Muslim Personal laws. This code under chapter IX, provides a uniform law of maintenance through the amendment in Criminal Procedure Code in 1973 the uniform law of maintenance was introduced to all citizens of India. The definition of wife as given in explanation of Section 125 of the Criminal Procedure Code, 1973 is noteworthy for the purpose of analysis: •"Wife includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried". This definition of the wife was objectionable to the scholars to the Islamic matrimonial jurisprudence as the same was foreign to the Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized. This definition of wife laid down by the legal fiction on the basis of which

the two strangers being of opposite sex (after the divorce on the expiry of *lddat* period) are treated to be the husband and wife under Section 125 of the Cr. P.C. for the purposes of maintenance even after divorce. When the bill to this effect was in process it was subjected to tooth and nail opposition by Muslim members in the legislative house *viz,* Ibrahim Sulaiman Seth, G.M. Banatwala, and others. They objected the explanatory clause defining the term 'wife' and they advanced potent advocacy that the Muslim must be exempted from the ambit of the definition of wife, but the strong defense of the then law minister and minority of opposition including Muslim members came in the way and resultantly could not achieve the desired goal. The law minister painted out that the explanation in Section 125, of the Cr.P.C. did not affect the civil status of husband and wife and manner and besides this, made the following observation: "we have received a lot of representations which show that after divorce, woman are generally in very bad plight and it is a very difficult social and humanitarian problem, I do not think that Muslim Personal Law comes into the problem". However, the advocacy of law minister and other supporter's plea could not satisfy, and a proposed modification was vehemently opposed by the numerous Section of Muslims.

The definition of the wife was objected by the scholars Islamic matrimonial jurisprudence as the same is foreign to Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized, Resultantly, Section 127 (3)(b) was added to satisfy the Muslim community's resentment and the same was desired to work as exception, this empowers the Magistrate to cancel the order to maintenance passed under Section 125 of the code. If the divorce

women has received whether before or after the date of the said order, the whole or the sum which was payable under customary or personal law applicable to parties.[66] The Provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.[67]

In *Bai Tahira's* case, the supreme Court did not turn to the *Holy Quran* but confined itself to Section 125 considering it as a secular provision and came to the conclusion that the claim of maintenance by the divorcee was indefeasible be the husband Hindu, Muslim or others, so long as the spouse had not remarried and had no means to maintain herself. The very next year the court reinforced it's earlier decision in *Fuzlunbi's*[68] case in the following words:

"Whatever be the facts of a particular case, the Criminal Procedure Code by enacting Section 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill used wives and the castaway ex-wives, only if the woman has not receive voluntarily a sum at the time of divorce, sufficient to keep her going according to the circumstances of the parties".

Section 127 (3) (b) of Criminal Procedure Code lays down that "Where any order has been made under Section 125 in favour of a woman who has been divorced by or has obtained a divorce from her husband, the Magistrate shall cancel such order of maintenance if he is satisfied that the divorced woman has received the whole of the sum

[66] Mohammad Shabbir, Muslim Pesonal Law and Judiciary (Ed.. 1st, 1988, Allahabad)
[67] Bai Tahira v. Ali Husain, AIR 1979, SC 362.
[68] Fuzlunbi v. Kader Vali, AIR 1980, SC 1730.

whether before or after the date of such order under the personal law applicable to the parties.

The position as finally enacted laid down that through court could grant maintenance to a divorced wife, at the time of so doing, they should give due consideration as to whether she had already realized from her husband in full, her post divorce entitlement under any customary or the personal law of the parties.

The perusal of the legislative history of Section-127 (3) (b) made it clear that this provision was brought to provide to safeguard to Muslims and their persons law. It empowers the magistrate to cancel the order Section 125 of Criminal Procedure Code, 1973 if the divorced women who has received whether before or after the date of said order the whole of sum which was payable under any customary or personal law applicable to those parties. *Mr. Justice Krishna Iyer* further states: "Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section

127 (3) (b) as much as it does Section!25. So a farthing is not substitute for a fortune nor naive consent equivalent to intelligent acceptance". Thus the impact of Sections 125-127 of the Criminal Procedure Code, 1973, on the maintenance rights of Muslim ex-wives has been the subject of interpretation through Indian judiciary. The ruling laid down in *Bai Tahira's case* and *Fuzlunbi's case,* and their objection ability to Muslims are well known and to get the desired result in 1981. The Supreme Court was asked to reconsider these ruling in *Mohd Ahamd Khan v. Shah Bano Begum.*[69] However it added fuel to the fire by

[69] AIR 1985, SC 945.

laying down: "Although the limits of the Muslim Husband's liability to prove for maintenance of the divorced wife is up to the period of *Iddat* it does not contemplate or countenance the situation envisaged by Section 125 of the code, it would be incorrect and unjust to extent the above principle of Muslim law cases in which the divorced wife is able to maintain herself. The husband liability ceases with the expiration of period of *Iddat.* But if she is unable to maintain herself after the period of *Iddat* she is entitled to have recourse to Section 125 of the Code".

But chief Justice of Supreme Court Mr. Justice Y.V. Chandrachud going for beyond Mr. Justice Iyer's thinking intruded into Muslim Personal Law saying the said special provision of the code totally ineffective. Two points mainly alarmed the Muslim of such judgment for the Alleged attempt of the judge to "reinterpret" certain Qur'anic verses and *Second* admonition to the state in respect of the uniform civil code.

As a result religious sentiments of Muslim were not only injured by the wording and purport of the *Shah Bano's* judgment, but also much more by its projection on an anti - Islamic law ruling of the highest court of justice in the country. There upon Muslim organizations and individuals under the leadership of the All India Muslim Personal law Board started a country wide agitation and caused the majority of Muslim citizen in India to demand statutory protection of their personal law.

Some relevant provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 regarding Maintenance of Muslim Divorce are in need of separate treatment. Section 3(l)(a) of Muslim Women

(Protection of Rights on Divorce) Act, 1986 lays down that a divorced Muslim wife shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband. Section 3(1) (b) of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down the condition where divorced Muslim wife herself maintains the children born to her before or after her divorce, In this condition she will be entitled to a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children. Section 3(l)(c) of Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down that a Muslim divorced wife shall be entitled to an amount equal to the sum of *mahr* or *dower* agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law. Section 3(l)(d) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down a Muslim divorcee will be entitled to all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends. Section 3(2) of this act lays down that where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been or made or paid or the properties referred to in clause (d) of sub-Section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or *dower* or the delivery of properties, as the case may be.

Section 4 of Muslim Women (Protection of Rights on Divorce) Act,

1986, deals with the rules as to order for payment of maintenance. Sub-section (1) of this Section lays down that notwithstanding anything contained in the forgoing provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay reasonable and fair maintenance to her as he determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at period as he may specify in his order. There is a proviso in this Section which provides that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and the event of any such children being unable to pay such maintenance; the magistrate shall order the parents of such divorced woman to pay maintenance to her. The second proviso of this Section provides further that if any of the parents is unable to pay his or share of the maintenance ordered by the Magistrate on the ground of his or not having the means to pay the same the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance order by him be paid by such of the order relatives as may appear to the Magistrate to have the means of paying the same in such proportion as the Magistrate may think fit to order. Sub-section 2 of this Section lays down that where divorced woman is unable to maintain herself and she has no relatives as mentioned Sub-section (1)

or such relatives or any one of them have not enough means to pay the maintenance ordered by the magistrate or the other relatives have not the means to pay shares of those relatives whose shares have been ordered by the magistrate to be paid by such other relatives under the proviso to sub-Section (1), the Magistrate may, by order direct the State Wakf Board established under Section 9 of the Wakf Act (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by the under sub-Section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, gives the option to divorced Muslim wife to be governed by the provisions of Section 125 to Section 128 of Criminal Procedure Code, 1973, but the condition is that there must be an agreement between the husband and wife by an affidavit, that they would prefer to be governed by the provisions of Section 125 to Section-128 of Criminal Procedure Code, 1973. It is also necessary that the declare must be made on the date of the first hearing. The explanation of this Section says that for the purpose of this Section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

Section 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, is the transitional position which lays down that every application by a divorced woman under Section 125 or under Section 127 of the Criminal Procedure Code , 1973 (2 of 1974), pending before a Magistrate or the commencement of this Act, shall,

notwithstanding anything contained in that code and subject to the provisions of Section 5 of this Act, be disposed of by such magistrate in accordance with the provisions of this Act.

(b) Evaluation of judicial pronouncements

The judicial attitude towards the application of maintenance provisions to Muslim wives and divorcee has created a crisis. The interpretation of Section 125 and 12 (3) (b) of the code as applicable to Muslim has been considered by the Supreme Court and High Courts but the decision are some how opposed to the Spirit of Islamic Law. The courts have dealt with the following issues from time to time.

1. Whether Section 125 of the code is violative of Articles 14 and 19, offends the fundamental rights under Articles 25 and 26 of the Constitution?

2. Whether the definition of the wife envisaged in explanation (b) of Section 125 (1) of the code is in conflict with the personal law of Muslims of India?

3. Whether a Muslim divorce can seek the benefit of Section 125 of the code?

4. Whether the payment of *mahr* by a Muslim satisfied the requirements of Section 127 (3) (b) and obliged the Magistrate to cancel a maintenance order made in favour of a Muslim divorcee? The Criminal Procedure Code, 1973 provides a uniforms law of maintenance. The new provisions enjoin payment of maintenance to divorce till their remarriage of death. It imports to create an artificial relation of husband and wife

only for the purpose of maintenance after divorce.[70] Section 125 of the Criminal Procedure Code, 1973 by means of an explanation sought to extend the magisterial power to provide for maintenance of an ex-wife also.

However, an exception in the form of Section 127 (3) (b), this empowers a magistrate to cancel the order of maintenance made under Section 125 of the code, if the divorced women has received, whether before or after the date of the said order, the whole of the sum which under any customary of personal law applicable to the parties was payable.[71]

Where any order has been made under Section 125 of Cr. P.C. in favour of a women who has been divorced by or has obtained a divorce from or her husband, the magistrate shall if he is satisfied that the women has been divorced by her husband and that she has received, whether before or after the date of order, the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce.

Under the new code the questions arise:

1. Whether a Muslim divorce can seek to the benefits of Section 125?

2. What is the 'sum due' from the husband to the wife on divorce under the Muslim law?

3. If the husband paid the whole of sum is there any justification in

[70] See Chapter 9 of the new code- 1973.
[71] See 127 93(b) of the Cr. PC.

refusing the benefits conferred by Section 127 (3) (b)?

In 1976, the Division Bench of Kerala High Court in *Kunhi Moyln Case*[72] held that under the new code the Muslim divorced wife is entitled for maintenance under Section 125 of the new code after the *Iddat* period. In *U.A. Khan*[73] the Karnataka High Court observed that the maintenance for some additional period beyond the period *of Iddat* becomes available to divorced Muslim women under Section 125 of the code. This additional benefit does not at all in the conflict with the right she has under the Mohammaden Law.

For the first time in *Kunhi Moyin's* case, the division of bench of Kerala High Court has held that the payment of maintenance during *'Iddat'* or the payment of *Mahr* will not exonerate the Muslim Husband from the liability towards the divorced wife under Section 125. Justice Khalid speaking on behalf of division Bench gave the social purpose of legislation and observed:

"The new definition (of wife) does not violate the fundamental rights guaranteed under article 25 (1) of the constitution. The definition of Section 125 (1) comes with the expression "providing for social welfare and reform", legislation contained in Art 25 (2) of the constitutions, and hence the challenge of Articles 25 is not available for the petitioner. The Criminal Procedure Code, 1973 transcends the personal law of the parties".

The Constitution is openly and determinedly secular. Religious discrimination on the part of the state is forbidden.[74] Freedom of

[72] Kunhi Moyin v. Pathamma, (1976) KLT 92, 1976 MLJ (Criminal) 405.
[73] U.A. Khan v. Mahboobunnisa (1976) Cr. L. 395.
[74] Article 15, 16, 29(2), 30(2) of the Indian Constitution

Religion is guaranteed.[75] Dr. Ambedkar in the constituent Assembly had expressed his awareness of the situation that would crop out in the field of social welfare legislation and social welfare programs of a government.

In *Iqbal Ahmad Khan*[76] Case, the Allahabad High Court held that Section 125 of the code is not repugnant to Article 25 of the constitution. The court further observed that the history of applicability of Muslim law shows that the payment or non-payment of maintenance to one's wife could never be regarded as a matter of personal law.

In *Isac Chandra Palker*[77] Case, the division bench of the Bombay High Court held that the maintenance right conferred upon the divorcee even after the *Iddat* period, under Section 125, is additional and independent right. The provisions of the *Shariai* Application Act , I937 and Section 125 of the Cr.P.C. can stand together as there is no inconsistency between them.

Justice R.K. Shukla of Allahabad High Court in *Mohd Yameen*[78] Case, observed that Section 125 is applicable and enforceable whatever may be the personal law of parties. Thus Kerala, Bombay, Calcutta and Karnatka High Court have taken the view that the Muslim Divorcees are entitled to the maintenance under Section 125 of the code even after the *Iddat* period. However, later Bombay, Andhra Pradesh and Full bench of Kerala High Court have taken a contrary view holding that if the husband satisfied the magistrate in proceedings under Section 125 of the code, that he has complied with requirements of

[75] Article 25, 26, 28m 29 and 30(1) of the Indian Constitution
[76] I.A. Khan v. State of UP 1980, Cr. LJ (80 NOC) All 34.
[77] Isac Chandra Palker v. Nayamat Bi (1980) Cr. L.J. 1180
[78] Mohd Yameen v. Shamim Bano (1984) Cr. LJ 1297

Section 127 (3) (b), the divorced wife does not have any subsisting right of maintenance.

The Supreme Court of India in case of *Bai-Tahira v. Ali Hussain*[79] found itself in dilemma at the time of interpreting Sections, of Criminal Procedure Code, 1973. The facts of the case are enumerated as follows:

The respondent Ali Hussain (Husband) married the appellant Tahira (Wife) as a second wife, way back in 1956, and after few years had a son by her.

The initial warmth vanished and jealous is of triangular situation erupted marrying mutual affection. The respondent divorced the appellant around July 1962.

A suit relating to a flat in which the husband had housed the wife resulted in a consent decree, which also settled the marital dispute. For instance is recited that the respondent had transferred the suit premises, namely a flat in Bombay to the appellant and also the shares of the cooperatives housing society, which built that flat. The amount of *Mahr* (money Rs. 5000/-) and maintenance of *Iddat* period was also paid to the appellant.

The plaintiff declares that she has no claim or rights what so ever against the defendant or against states or properties of the defendant.[80]

After the enforcement of code[81] wife made a claim for maintenance from her husband under the Section.

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[79] AIR 1979 SC 362
[80] 127 (3) (b) of Cr. PC
[81] See Section 125 of Cr. PC.

In the instant case, supreme court surprisingly ignored the express legislative intention and connected the amount of dower payable at the time of divorce under the personal law with the amount of maintenance which accordingly to the court must sufficient to maintain the divorced women.

The Apex Court Bench, consisting of Justice Tulza Pulkar and Justice Pathak honoured the appeal of *Bai Tahira 's* maintenance and on behalf of the court justice Krishna Iyer observed the following.

He further says: The payment of illusory amount by way of customary or personal laws requirement will be considered in the reduction of maintenance state but can not annihilate unless it is reasonable substitution. The observation of the Supreme Court has amended some words in Section 127(3)(b) giving meaning t it that the magistrate is empowered to cancel such order on the satisfaction that such whole of the sum is sufficient to do the duty of the wife and if it is not. It shall any be adjusted to be claim. Now in effect 'magistrate shall cancel' has turned to be 'magistrate may cancel' and after the words 'whole of the sum' the words 'sufficient to do the duty of maintenance' are inserted by construction.

In *Fazlun Bi v. Khader & others*[82], the Apex court again followed the ruling in *Bai Tahira's* case. Where the husband had divorced his wife & paid Rs. 500/- as a Mehr and Rs. 750/- as a maintenance for the *Iddat* period. The Andhra Pradesh High Court made a clear distinction from the issue raised in Bai Tahira's case. In the instant case the husband did not raised any plea based on Section 127 (3) (b) of Cr.

[82] (1980) Cr. LJ 1249.

P.C. But the Supreme Court reiterating its previous ruling observed that whether or not the plea was explicitly answered in that case, the wife was given right to demand maintenance from her husband. The facts of the case are enumerated in the following manner:

Fazlun Bi, the appellant married *Khader Wall,* the respondent in 1966 and during their conjugal relationship a son was born to them. Due to some misunderstanding and strain relationship between the couple, the appellant left the house of her husband and went to her father's house. She prayed for maintenance, which was granted by lower court and upheld by the High Court. After this the respondent divorced his wife unilaterally and paid her amount of *'Mahr'* which was Rs. 500/- and the maintenance for the period *Iddat* which Rs. 750/- on the basis of divorce. The appellant Fuzlun Bi was ordered not entitled for maintenance as her *'Mahr'* money and maintenance for 3 months was already paid. The session judge and High court also upheld the order of the magistrate. The appellant landed in Supreme Court against this judgment. The judgment was delivered by justice Krishna Iyer on behalf of Justice Chennappa Reddy & Justice A.P. Singh. The Honorable justice Krishna Iyer again expressed. That the payment of personal law amount as envisaged by Cr.PC[83] should be reasonable and not illusory. According to justice Krishna Iyer: "even by harmonizing payments under personal and customary laws with the obligation under Section 125 to 127 of the liquidated and not a illusory amount will released the former husband from the continuing liability only if the sum paid is sufficient to maintain the former wife and salvage from the destitution. The payment of amount, customary or

[83] Section 127(3)(b)

others, contemplated by the measure must inset the intent of preventing destitution and providing a sum which in more or Jess the present worth of the monthly maintenance allowances the divorces may need until death or remarriage overtake her. The policy of the law about neglected wives and destitute divorcees and Section 127 (3) (b) takes care to avoid double one under custom at the time of divorce and another under Section 125, A farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance",

Mahr as defined by Muslim law is a token of respect for a Muslim women and payment of the *Mahr* would be payable by the husband in the loss of connubial relationship.[84] The principle laid down in *Fazlun Bi* and *Bai Tahira's* case violate the substantive Islamic law of maintenance. The approach of SC reflects the judicial legislation and not judicial interpretation. It is well established fact that constitution of India is the supreme law of the land. Therefore, the courts are in duty to follow the constitution rather then to deviate from the very sprit of the Constitution. Constitution is the source from which every institution derives authority admits the theory of separation of power. Therefore, constitutionally the approach of the Apex court in the instant case is not legitimate. There is an experiment to give the harmonious construction to the Section 125 and 127(3)(b) or Cr. P.C. so as to achieve the true intention of the legislation. Section 127(3)(b) was mean to provide protection to Muslim Women and dilute the evil effect of the definition of the 'wife' given under Section 125 of Cr.P.C. But it is very unfortunate that judiciary could not take the cognizance in number of cases of conflict between Muslim personal law and

[84] Fazun Bi v. Khader and another (1980) Cr. LJ 1249

Section 125 of Cr.P.C. There is a clear cut conflict between Section 125 of Criminal Procedure Code, 1973, and Muslim law. The court has restricted itself to only one aspect of the problem, that is right of a women saying that it is right of the women conferring an additional right is not in conflict with Muslim law, But the court failed to consider this important aspect, the duty of husband under Islamic law under Islam he is under obligation to pay maintenance till *Iddat* period and not after that period and divorce. Where as Section 125 required conversely.

Moreover the provision of the Cr.P.C. are applicable to all Indians irrespective of their cast, creed and religion. In order to prevent any grievance to any portion of state population by any state law or action special enactment are made to harnessed any excessive effect on their faith and sentiments. Thus in case of any inconstancy with Section 125 of Cr.P.C. and the Shariyat Application Act, 1937, latter should prevail. The definition of wife leads to the fact that a divorced Muslim woman irrespective of more resolution of marriage is entitled to maintenance up to the marriage or death.

Therefore, the correct construction of Section 127(3)(b) which impliedly protects the Muslim personal law, is that it is applicable to all the modes of the Muslim divorce determining the period of maintenance of divorced women. Further, Section 127(3)(b) does not deal with the case in which divorce has been obtained through the process of law.

Position after *Shah Bano's* Judgment

The unanimous decision of a five judge's constitution Bench of the Supreme Court in *Mohd Ahmad Khan v. Shah Bano*[85] has evoked strong reaction among the Muslim and has also created the crisis. The facts of the case are as follows:

Mohd Ahamd Khan an advocate of Indore married Shah Bano in the year 1932. In the course of matrimonial wedlock three sons and two daughters were born to Shah Bano, lived as husband and wife for more than four decades. But then Mohammad Ahmad Khan drove Shah Bano of the matrimonial home. In the year 1975, in April 1978. after Shah Bano filed a petition under Section 125 of the code in the court of Judicial Magistrate, Indore asking for maintenance allowing from her husband of Rs, 500/- per month. Six months later filing of petition by Shah Bano her husband on November 6, 1978 divorced her by an irrevocable Talaq then Mohd Ahamd Khan himself, opposed the petition on the ground that he had already divorced her and paid her a sum of Rs. 3000/- on account of *Mahr* and maintenance for the period of *Iddat.* In August, 1979 after hearing both the sides the magistrate overruled the defence of Mohammad Ahmad Khan and passed an order granting Shah Bano a sum of Rs. 25/- per month by way of maintenance. She was not happy about the magistrate order as the income of the husband was around 60,000/- per year. Therefore, she filed an application in M.P. High Court to enhance this amount. The High Court enhanced the maintenance allowance to 179, 00 per month. Aggrieved by this order of the High Court, Mohammad Ahmad Khan filed on appeal in the Supreme Court which was heard by a Bench

consisting of Justice Murtaza Fazal Ali and Justice A. Varadh Rajan observed that Bai Tahira[86] and Fazlun Bi,[87] cases where were not rightly decided, therefore, they referred this appeal to a larger Bench by an order.

In this case Mohammad Ahmad Khan sought to defend his case in the following enumerated grounds:

1. Under Muslim law a divorced women is entitled to maintenance during the period of *Iddat* only and not there after.

2. Since, Mohd. Ahmad Khan has already paid her the dower money which was according to him sum payable on divorce within the meaning of Section[88] of Cr. P.C. and maintenance order could be passed against him or maintained any longer the Five Judges Constitutional Bench of the Supreme Court, after wide ranging discussion based arrangement by the courts as well as by several intervenes including the All India Muslim Personal Law Board, animously upheld a single judgment delivered by the chief justice Chandrachud.

3. A divorced wife is entitled to apply for maintenance under Section 125 of the code. A *Mahr* is not a sum which under Muslim law is payable on divorce. So *Mahr* does not fall in the ambit of Section 127 (3) (b) of the code. If there is only conflict between the Section 125 of the code and Muslim Personal Law, Section 125 overrides the personal laws. The government

[85] AIR 1985 SC 945
[86] Bai Tahira v. Ali Husain
[87] Fazlun Bi v. Khader AIR 1980 SC 1730
[88] Section 127 (3) (b)

should implement Article 44 of the Constitution of India the written arguments of the appellant are raised as follows.[89]

It has been contended on behalf of the intravenous supporting the respondents by Sri Danial Latiti, Senior Advocate that under the Muslim Personal Law there is liability on the part on the former husband to his divorced wife. He relied on verse 241 of chapter II of the holy *Quran.* Which says; "For divorced women maintenance should be provided on a reasonable scale this is a duty of righteous". All that has been stated in the various verses of the Qur'an does not contain the percepts of the law. Is the Prophet (S.A.W.) ordained, should be followed by the Muslim as regard instances in point what Shafi which founder of Shafi School said can be pursued? He is of the view that no maintenance is due to a woman repudiated by irrevocable divorce unless she is pregnant. It is clear that prophet (S.A.W.) himself made if clear that in case of irrevocable divorce no maintenance will be payable to divorce.

Second caliph has recorded, a percept of the Prophet (S.A.W.) to the effect that maintenance is due to a women divorced thrice during her *Iddat.* The *Hedaya*[90] says, there are also a variety of traditions of same purpose.

The *Holy Quran*[91] says, divorced women shall wait concerning them selves three monthly periods. Baillie has also state that a divorced women is entitled to maintenance during the period of *Iddat.* Further, so many event of authors have stated that divorced women is entitled

[89] Daniel Latifi "Muslim Law" XXI A.S. I.L. (1985) pp. 389-390 see also journal of Islamic and Comparative Law Quarterly Vol. No. 2 (1985) pp. 115-117.
[90] Chapter XV p. 145.
[91] Verse 228.

to maintenance only during the period of *Iddat.*

The question of *Mata* in the *Quran*[92] the nearest English equivalent is the word, 'Provision', the essence lies in that *'mata'* has no connotation of recurrence as maintenance in Islam lays down that on divorce, women should be treated with due respect and apart from the husband, the later is exerted to make suitable gift at the time of separation. It is significant to point out the word *'mata'* as temporary conventions in sura 40 verse 39. The verse says, "O my people: thus life of the present is nothing but (temporary) convenience".

The period of three months after divorce for women without menstruation. *(Surah-talaq: Aiyat-4)* of the *Holy Quran* which prescribed.

"Such of you women as have passed the age of monthly course for them the prescribed period, if he has any doubt is three months, and for those who have no course (it is the same).[93]

The period till delivery for those pregnant above *Aiyat* further prescribed:

> *"for those who carry, (life within their wombs), there period is until they deliver their burden's and for those who fear God, he will make their path easy".*[94]

The fact is that only Islamic *Sharia* does not leave any women married, divorced women, widow without adequate protection even for a day. The rules relating for maintenance under Islam are based on definite and firm ground. The close relative of a divorced women in necessities

[92] Surah 2 Ayar 241.
[93] Surah Talaq Verse 4.

are obliged to maintain her and this obligation calculated as per the schemes of inheritance. Thus the judgment in *Bai Tahira's* and *Fazlum Bi's* case went against the Islamic law on divorce and maintenance which has been expressly protected by the *Shariat* Act, 1937.

Enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

In 1986, it was the after a month of Shah Bano's judgment when the parliament had to mend not only to renovate the maintenance provisions but to pass a full fledged Act, relating to the maintenance for Muslim divorcee in accordance with *Shariat* When the Shah Bano's case was decided by the Apex judiciary a great controversy in Muslim circle denoted and the Muslims depreciated and deprecated to accept the judgment thereof and further demonstrated that the line of reasoning adopted by the judiciary was wholly unjustifiable and contrary to the *Shariat.* Under the banner of All India Muslim Personal Law Board, a countrywide, agitation and protest was started and same germinant the consensus of the majority of Muslim of India in favour of the move to demand statutory protection of their personal law relating to maintenance.

The Muslim women (Protection of Rights on Divorce) Act, 1986 inspite of some shortcomings is by and large in consonance with Muslim law of maintenance and secures maintenance rights of Muslim married women to a great extent. The Apex court in such cases not merely ignored legislature history and the intention of the legislation but also violated the well established rules of harmonious construction.

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[94] Ibid.

In the name of women emancipation the Supreme Court at so many occasions tried to violate the personal laws of Muslim and encroached the universally accepted principles of *Quran* and *Hadith.*

Judicial Scenario after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Now some cases would be discussed to show the judicial scenario after enactment of Muslim Woman Act, 1986.

Md. Yunus v. Bibi Phenkani Alias Nisa,[95] the court was required to decide whether the right under Section 125 of the Cr. P.C. to claim maintenance subsists even after the Act of 1986. It was held by the court that Section 3 (1) (a) of the Act 1986 curtailed the right of a divorced Muslim women to get maintenance for the period *ofIddat* only. It was further said that the right to get maintenance from her husband given to a wife under Section 125 of the court until she remarried has been impliedly repealed in case of a divorced Muslim wife governed by the provision of Section 3 (1) (a) of the Act of 1986.

In *Haji Farzand Ali v.Noor Jahan,*[96] a women filed an application for the maintenance of herself and her 3 children. The magistrate granted rupees 300/- for children. The husband filed and appeal against the order arguing that the right of he children ancillary of 1986 Act, the children right to maintenance under Section 125 also was not maintainable. Negating the contention the court held that the children's right was independent of mother. All the clauses (a) (b) (c) and (d) of Section 125 have used the conjunction 'or' which is significant and

[95] (1987) 2 Crimes 241.
[96] (1988) Cr. P.C. L.J. 1421 (Raj)

shall each claimant's right is independent.

In *A.A. Abdullah v. A.B. Mehmoona Saiyad,*[97] it was held that a divorced Muslim woman is entitled to maintenance after contemplation of her need and the maintenance is not limited only up to *Iddat* period. The phrase used in Section 3 (1) (a) of the Act of 1986 is "Reasonable and fair provision and maintenance to be made and paid to her" indicates that the parliament intended to see that the divorced women gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the street without a roof over her head and without any means of sustaining herself and her children. It was also held that the word 'within' under Section 3 (1) (a) could not be read as for or during therefore the husband was held to be liable for making reasonable and fair provision and maintenance to the wife even after the period *of Iddat.*

In AbidAli v. Mst Raisa Begum,[98] the division bench of Rajasthan High Court has given the following view. In this case the question before the court was the effect of the provision of Act 1986 on an order passed under Section 125 of Cr.P.C. The division bench held that the Act of 1986 does not contain any saving clause for the right created by an order passed in favour of divorced Muslim women. The Act has completely obliterated the right of such women to get maintenance. The appeal without saving such right and that right now can not be enforced under Section 125 clause (3) of the code. A brief reference may also be made to the decision in *Abduallah Gafoor v. A.U. Pathumma Bibi,*[99] it was held by the court that divorced Muslim

[97] AIR 1988 (Guj.) 141.
[98] (1988) L. Raj. L.R. 104
[99] (1989) Cr. L.J. 1224 Karnataka

women is not entitled to invoked Section 127 of the Criminal Procedure code for seeking enhancement of maintenance after 19 May, 1986, the date on which the Act of 1986 came in to force. The court further held that even though Section 125-127 of the code have not been repealed by the Act of 1986, it can be said that the Act of 1986 supplemented, widen, or enshrined the contents of the rights ensuring to the wife under the code.

In *Ali v. Sufaira,*[100] it was held that under Section 3 (1) (a) of the Act of 1986, a divorced Muslim woman is not only entitled to maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future. In this case the distinction was made between what is reasonable what is reasonable and fair provision and maintenance which is payable to the divorced women. The learned judge concluded that: "It is clear that the Muslim who believes in god must give a reasonable amount by way of gift or maintenance to the divorced lady. The gift or maintenance which is payable to the divorced women." The learned judge concluded that: "It is clear that Muslim who believes in God must give a reasonable amount by way of gift or maintenance is not limited to the period of *Iddat* it is for her future livelihood because God wishes to see all well".

The court, therefore held that under Section 3 (1) (a) a divorced Muslim not only entitled to the maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future and directed the Magistrate to pass orders giving effect to this intention of the legislature.

[100] (1988) 3 crimes 147.

Judiciary on the Application of the Muslim Women (Protection of Rights on Divorce) Act, 1986

An impression is there that the Act undoes the gains of divorced Muslim Woman. It is not correct as a close analysis shows that the Act does nothing like throwing out of window the *Shah Bano's* verdict or the legislative progress enshrined in the provisions of Criminal Procedure Code, 1973. The main features of this enactment may be summed up as the Act accords relief the divorcee. It does not say that *Mahr* is a consideration for divorce for is the sum referred to in Section I27(3)(b) Cr. P.C. It does not lay down that no maintenance is to be paid to the divorcee after *iddat* or that she is to be abandoned for the life after *iddat.*

The preamble of Act says that it is 'an Act to protect the rights of Muslim Women who have been divorced and further to provide for matters, connected and incidental thereto. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, entitles a divorced woman to (i) reasonable and fair provision, and (ii) maintenance to her, (iii) provision and maintenance to her children for two years, (iv) *Mahr* amount and (v) All properties given to her before, at the time and after her marriage. Out of these, the 'provision' and 'maintenance' are to be made and paid to her within the *Iddat* period by her former husband.

Does it mean that the maintenance is to be paid to her only during the *Iddat* period? The original controversy resurrected in *Arab A. Abdullah v. Arab Arab Bail Mohmuna Saiyad Bhai.*[101] In the instant case, the

[101] AIR 1988 Guj 141

matter takes into consideration was the validity of an order passed under Section 125 of Cr P.C. in view of Muslim Women (Protection of Rights on Divorce) Act, 1986. The main questions arose in the instant case for the determinations are: (i) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by the Judicial Magistrate of First Class, under Cr, P.C. ordering the husband to pay the maintenance to the wife are nullified? (ii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, takes away the rights which are conferred upon the Muslim divorced wife under the personal law or under general law. (iii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced Woman is entitled to have maintenance during the *iddat* Period only. The divorced wife (the respondent) has filed criminal application under Sec. 125 of Cr. P.C. claiming maintenance allowance, the magistrate granted Rs. 250 per month. Additional Session Judge confirmed the order. Against that order, the petitioner husband filed the criminal application in the High Court. The petitioner husband contended that So far as the first issue was concerned they alleged that in view of the provision of Muslim Women (Protection of Rights on Divorce) Act 1986, the orders passed by the magistrate under Section 125 of Criminal Procedure Code is non-est. They relied on Section 7 of the Muslim Women (Protection of Rights on Divorce)Act 1986 to support their argument. In regard to the second issue they contended according to the Muslim Personal Law, the husbands liability to provide of his divorced wife is limited to *iddat* period, despite the fact that she is unable to maintain herself. The reason behind that is that the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 is to nullify the interpretation given by

the Supreme Court in Shah Bano's Case . He contended that a divorced woman is entitled to get maintenance from her former husband within the *iddat* period only and that word within should be read as "during" or "for". It was further admitted that if the parliament wanted to provide for future maintenance to the divorced women, then the parliament would not have provided that the said amount should be paid within the *iddat* period but instead of that the parliament has specified the time. Contentions of the respondent wife were thatwith regard to the first issue they submitted that Section 7 of Muslim Woman (Protection of Rights on Divorce)Act 1986 clearly indicates that there is no inconsistency between the Muslim Women (Protection of Rights on Divorce) Act 1986 and the provisions of Cr. P.C. 125 to 128. The provisions of Muslim Women (Protection of Rights on Divorce) Act 1986 grant more relief to the divorced women depending upon the financial position of her former husband. So far as the second point is concerned the and alleged that there is a presumption against an implied repeal because there is a presumption that the legislature enacts the laws with complete knowledge of existing laws obtaining on the same subject and to failure to add a repealing clause indicates that the intention of the legislature was not to repeal the existing laws. As to the third question they submitted that parliament has provided for making fair and reasonable provision and the payment of fair and reasonable provision and the payment of fair and reasonable maintenance to the divorced women after visualizing and contemplating her future need and the same has to be made within the *iddat* period by her former husband. The Hon'ble Gujrat High Court speaking through M.B. Shah J. reasoned and held as under:

(i) As regards the nullify of an order passed under Section 125 of Cr. P.C. after the enactment of Muslim Women (Protection of Rights on Divorce)Act, 1986, the Court reasoned that there is no Section in the Act which nullifies the order passed by the magistrate under Section 125 of Cr. P.C. Further once the order under Section 125 of Cr P.C. has been passed granting maintenance to the divorced wife then her rights are crystallized. There is no inconsistency between the provisions of the Act and provisions of Section 125-128 of Cr. P.C. On the contrary Act grants more relief to divorced Muslim Women depending upon the financial position of her husband.

(ii) As to the second issue the court relied on the statement of object and reasons as well as preamble of the Act. The Court held that on the plain reading of the Act, it cannot be said that Muslim Women (Protection of Rights on Divorce)Act 1986 in any way adversely affects the personal right of a Muslim divorced woman. Nowhere, it is provided that the rights which are conferred upon a Muslim divorced wife under personal law are abrogated or repealed. It does not provide that it was enacted for taking away same rights which Muslim woman seeking either under the personal law or general law under Section 125 of Criminal Procedure Code.

(iii) For the third issue, the court held that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for *iddat* only.

The dictionary meaning of the word 'within' is 'on or before' and 'not later than', 'not beyond' therefore the word 'within' meant that he was

bound to make and pay the provision and maintenance before the expiration of *iddat* period. It seems that the Judgment is not upto the mark as it could not decide successfully the matter whether maintenance of Muslim Women is only for *iddat* period or beyond *Iddat* Period.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju v. Patumma Beevi,*[102] The question before the Kerala High Court was whether the Muslim Women was entitled to invoke the Section 127 after the Muslim Women (Protection of Rights on Divorce) Act. 1986 came into force. The Session Judge was of the opinion that she could invoke the Section 127 of Muslim Women (Protection of Rights on Divorce) Act, 1986 as the Act contained no repeal, express or implied of the Code. Hon'ble High Court held that the Section 125 to 128 of the Cr. P.C. are not repealed but excluded or restricted. The well known rule of interpretation is that a special law excludes a general law when a special law namely the Muslim women (Protection of Rights on Divorce) Act, 1986 was passed to govern maintenance to Muslim wives, application to general law i.e. under code was excluded or restricted. On giving the answer to the argument that the right under the code is independent of personal law and unaffected., it was the opinion of Kerala High Court that if one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional right. It seems that the Judgment tried to give some clear cut picture regarding the (i)Application of Muslim Woman (Protection of Rights on Divorce)Act, 1986, (ii) Exclusion or restriction of the

[102] (1989) 1 KLJ 337

application of Section 125 to 128 of Cr. P.C. by a well known rule of interpretation that special law exclude the general law; (iii) it tried to reduce the effect of judgment in *A. A. Abdullah's* case which says that the Act gives the additional arrangement for the maintenance of women when maintenance by previous husband fell short of her needs. This judgment clarified that the provisions of the Act is not to provide additional right. The view of Gujrat High Court in *A.A. Abdullah Case* was also not approved by the High Courts of Andhra Pradesh, Guwahati and Calcutta.

In *Usma Khan Bahmani v.Fathimunnissa Begum,*[103] the issues of the case were: (i)Whether a divorced Muslim woman can claim maintenance under Section 125 of Criminal Procedure Code,1973 from her former husband even after the passing of the Act of 1986? (ii) Whether the maintenance contemplated under Section 3(1) (a) of the Act of 1986 is restricted only for the period of *Iddat?* Or (iii) whether a fair and reasonable provision has to be made for future also with in the period of *Iddat.* Here the ratio of Majority judgment was 2:1. The Court held on issue No.l that Section 3 of the Act of 1986 starts with a non obstante clause as it provides that "not with standing anything contained in any other law for the time being in force....."

Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of *Iddat,* is devolved upon the relatives and if the relatives are not available on the Waqf Board.

The very concept of the liability of the husband is limited for and

[103] 1990 Cr. L.J. 1364 APHC

during the period of *Iddat,* under Section 5, it is provided that the husband and wife would be governed Section 125 to 128 of the Cr. P.C if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provision of Sections 125 to 125 of the Cr.P.C.

Further, under Section 7 of the Act, the intention of the legislature is clear when it provided that every application by a divorced woman under Section 125 or 127 of the Cr.P.C., pending before the court or magistrate in the commencement of the Act of 1986, shall note with standing contained in that code and subject to the provision of in accordance with the provisions Section 5 of this Act be disposed of in accordance with the provision of the Act of 1986.

A combined and harmonious reading of the provisions of Section 3 to 7 of the Act of 1986 clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. On the Issue No.2, the court held that the liability of the Muslim husband to pay reasonable and fair provision and maintenance is confined only for and during the period *oilddat.* The concept of reasonable and fair provision and maintenance cannot be read as meaning two different things.The word *"Mafa"* used in *Ayat* 241 in chapter II" of the *Holy Quran* indicates that the word "Provision" and "maintenance" convey the same meaning. Even in *Shah Bano* case, it is recognized that the word "provision" and "maintenance" convey the same meaning. In such circumstances to say that a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to the negation of the very object of the Act for which Act of 1986 has been promulgated. It

would give rise to a new concept of liability on the part of the husband which would be difficult to be translated in concrete term as it would be almost impossible to visualize the future needs of the divorced Muslim woman which would be depending upon the several factor like remarriage, change in the circumstances, or in the life style etc.

Therefore, in regard to the second question the judge held that the liability of Muslim husband to pay the fair and reasonable provision and maintenance contemplated under Section 3(1)(a), of the Act is confined only upto the period of *Iddat* On the Issue No.3 the Court held that under Section 7 of the Act of 1986, it is specifically stated that every application by a divorced women under Section 125 or 127 of the code pending before a Magistrate on the commencement of the Act, shall be disposed of by the Magistrate in accordance with the provision of the Act of 1986, having due regard to Section 5 of the Act and the rules framed there under with regard to the option to be exercised by the parties. Any order of maintenance which is not warranted by the provision of the Act can not be executed against the husband. Therefore the Judge held that the Section 125 to 128 of Cr. P.C is not applicable after coming into force Act 1986, save in so far as the parties exercise their option under Section 5 of the Act, to be governed by the provision of Section 125 to 128 of Cr.P.C. it seems that judgment is good keeping in view of the actual position under the Muslim personal Law and historical background of the Act of 1986. It has very rightly decided the issues involved in the present case and has clarified the legal position on those issues. It has rightly remarked that divorced woman can not claim maintenance under Section 125 of Cr. P.C., after passing of the Act of 1986, except under some

special circumstances. It has held that if it has been recognized that the liability of the husband to pay maintenance is limited to the period of *Iddat,* then there is no justification to hold that the liability of making a reasonable future provision extend beyond the period *of Iddat* under Section 3(l)(a) of the Act. It has remarked correctly that the combined and harmonious reading of the Section 3 to Section 7 the Act of 1986, clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. In this case the majority dissented from the decision of Gujrat high Court in *A.A. Abdullah's* case, and decision of the Kerela High Court in *Ali v. Sufaira,*[104] wherein it was held that under Section 3(1)(a) a divorced woman was not only entitled to maintenance up to the period of *Iddat* but also to a reasonable and fair provision for her future.

The Calcutta High court, also dissented from the decision of the Gujrat High Court in *Abdul Rashid v. Sultana Begum,*[105] in the instant case, the main issues were: (i) Whether the Muslim husband has to provide maintenance to his divorced wife up to the period *of Iddat* or beyond the *Iddat* period? (ii)Can the Section 4 be interpreted to mean that it was open to divorced wife to claim maintenance under Section 4 of the Act in addition to Section 3 of Act. The Hon'ble High Court held on issue 1 that the liability of the husband to provide maintenance was limited for the period *of Iddat* and therefore, she was unable to maintain herself. She had to make an application under Section 4 of the Act. In view of the Act the court held on issue 2, that the provision could not be fairy interpreted to mean that it was open to divorced wife

[104] (1999) 3 Crimes 147.
[105] (1992) Cri. LJ 76

to claim maintenance under Section 4 of Act in addition to what she might have received under Section 3 of Act. This judgment seems to be good one keeping in view of the legislative background of Act of 1986 and actual position of Muslim personal law. This judgment was akin to the principles laid down in *Usman Khan Bahmani 's* case. It opposes the decision of *A.A. Abdullah's* Case decided by the Gujrat High Court. It rejected the interpretation of the Gujrat High Court which laid down that the provisions of the Act is to make an additional arrangements for her when maintenance allowance and provision settled by the previous husband fell short of her needs on account of some unforeseen circumstances.

Yet the Calcutta High Court took a different liberal view in *Shakeela Parveen Ali,*[106] the main Issues were: (i) Whether the term 'with in' used in 1 i (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 be interpreted only as 'for or during' or a future provision may be made within *Iddat* period or for beyond *Iddat* period, (ii) What procedure is to be followed when the petition regarding maintenance under Section 125 of Cr P.C. is pending before the passing of Act? The Calcutta High Court extensively quoted the judgment of Gujrat High Court and approved both the principles therein. The order passed by the Magistrate under Section 125 of Cr. P.C. was not by nullified the Muslim Women (Protection of Rights on Divorce) Act, 1986. The word 'within' in Section 3 does not mean 'for or during', it means 'on or before', and the parliament has nowhere provided that the reasonable and fair provision and maintenance are limited only for the *Iddat* period. Therefore the word 'within' meant the he was bound to make

[106] 2001 (1) CLJ 608

and to pay the provision and maintenance before expiration of *Iddat.* Accordingly it was held that the expression during *Iddat* period should be extended till a Mohammedan divorced female enters remarriage. The magistrate's order was modified to the effect that the petitioner was entitled to get maintenance allowance from the date of application till she remarries. This judgment can't be said upto the mark as it did not pay regard to the historical background of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court under the guise of so called judicial activism tried to extend the meaning of word 'within' unnecessarily. The additional benefit of maintenance to the divorced Muslim women till she remarries was an open encroachment of Muslim Personal Law. The meaning of word 'within' under Section 3(l)(a) of the Act can't be extended 'upto the remarriage of divorcee, while taking regard to the purpose, object & preamble of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Here it would be worth mentioning the case of *Idris Ali v. Ramesha Khatoon,*[107] the question before the court was whether the provision of Muslim Women (Protection of Rights on Divorce) Act, 1986, shall have the application when a divorced woman approaches the court of a magistrate for the execution of final order already *passed in her* favour under Section 125 of Cr.P.C. Petitioner contended that as soon as the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. Sections 125, 127, 128 of Cr.P.C, so far as *divorced Muslim women are* concerned became inapplicable on Muslim women by virtue of Section 7 of Muslim Women (Protection of Rights on

[107] AIR 1989 Gauhati 24

Divorce) Act, 1986. It was also pointed out that such aforesaid order maintenance would become nugatory and non-est in the eye of Law as the right of the parties have to be decided according to the provision of Section 3 and Section 4 of this new Act by virtue of Section-7 of the Muslim Women Protection of Rights on Divorce) Act, 1986. Respondent contended that action 7 has settled all controversy at rest .It was pointed out that Section 7 in terms mentioned that if an application filed by a divorced woman under Section125 or 127 of Cr. P.C., is pending before a magistrate on the commencement of the Act of 1986 then only it has to be disposed of according to the provisions of new Act of 1986. His submission was that condition precedent for the application of new Act was the pendency of the proceedings, under Section 125 and 127 of Cr P.C., on the date of the commencement a new Act of 1986 and once the proceeding is disposed of under Section 125 or 127 of Cr.P.C., by the magistrate then there is no pendency. After analyzing the fact end the law on the point the Hon'ble High Court held that if a divorced Muslim woman approaches the court of a magistrate for the execution of a final order already passed under Section 125, 127 of Cr.P.C., earlier to the new act of 1986, then she will have the right to get the order executed under Section!28 of Cr.P.C.,. which Section has been excluded from Section 7 of Act of 1986, and Section 7 of new Act of 1986 would not take away the right. It may be said, that this judgment shows the tendency of the judiciary to the application of the provisions of Criminal Procedure Code inspite of the coming into force of Muslim Women (Protection of Rights on Divorce) Act, 1986, which has made the sufficient provisions for providing the right to the maintenance of Muslim divorcees.

The single bench of the Bombay High Court had considered it just and equitable that the husband should pay the divorced wife the maintenance allowance even after the *Iddat* period, but thought it is necessary that this matter, in the interest of justice, should be re-accessed to full bench for its decision, therefore this revision application of *Karim Abdul Rehman Seikh v. Shehnaiz Karim Seikh,*[108] came up before the full bench comprising Shah J., Smt. Ranjana Desai J., and Fatil J. The four prime questions before the court were:

1. Whether the Muslim husband's liability under Section 3(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 to make a fair and reasonable provision and to pay maintenance is restricted only upto the *Iddat* period or whether it extends beyond *Iddat* period.

2. Whether the Act has the effect of invalidating the orders Judgments passed under Section 125 of the Code prior to the coming into force of Act, that is, whether the Act divests parties of vested rights or benefits by acting retrospectively,

3. After the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 whether the divorced Muslim wife apply for maintenance by invoking the provision of Chapter IX of Criminal Procedure Code, 1973.

4. Whether the family court has the jurisdiction to try applications of Muslim divorced woman for maintenance after coming into operation of Muslim woman Act 1986.

[108] 2000 (3) Mh. LJ 555.

The High Court held for issue No. 1, that a reasonable and fair provision has got to be distinct from maintenance. The word provision has a future content. In the context be of Section 3(1) (a) of this Act, it would mean an amount as would be necessary for the divorced woman to look after herself after the *Iddat* period. This may involve amount for her residence, food, clothing, medicine and the like expenses. So, like Section 125 of the code no maximum amount is fixed here, but the quantum, has got to be substantial having regard to the future needs of the woman. The court concluded that the husband has to pay her within the *Iddat* period but he has to make the reasonable and fait provision for her within the *Iddat* period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women (Protection of Rights on Divorce) Act, 1986 while deciding this amount regard will be had to the needs of the divorced woman, the standards of the life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lump sum payment he can ask for the installment. Further, till the husband makes the provision the magistrate may direct monthly payment to her even beyond *Iddat,* till amount is fixed. On the second Issue, the court held that "The Section of 125 Cr P.C., prior to the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 are not nullified by reason of its coming into force. The Act does not direst the divorced woman's right to get maintenance under Section 125 of the vested in her by reason of the order of he competent court passed prior to its coming into force".

For the issue No.3, the court ruled that "After the commencement of the Act a divorced wife cannot apply for maintenance by invoking the

provisions of Chapter IX[th] of the code. According to Section 5 a divorced wife and her husband can by an agreement subject themselves to the jurisdiction of magistrate under Section 125 and 127 of the code and agree to be governed by the said provisions (but not without such agreement).

On the 4[th] issue, the Court held "by virtue of Section 3 and Section 4 of the said Act the application under Section 5 and Section 7 of the Act have to be filed before the Magistrate only. We therefore hold that after coming into force of the Act of 1986 the Muslim women can apply under Section 3 and Section 4 of Act only before the first class Magistrate having jurisdiction under the code. The Family court can not deal with such application".

These case prior to Denial Latifi case can be quoted in brief such as in *Raflq v. Farida Bi,*[109] Madhya Pradesh High Court held that if a divorced Muslim wife wanted maintenance beyond the *Iddat* period, she had to make her relatives/Waqf Board as parties to suit under Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986, as the husband could not be made a party. Virtually this judgment is in the consonance of the intention of the legislature in enactment of Muslim woman Act, 1986. This judgment support the traditional view of Muslim Personal Law that the view of Muslim Personal law that the husband could not be made a party if the divorced Muslim woman wanted maintenance beyond the *Iddat* period.

In *Julekha v. M. Fazal,*[110] again the M.P. High Court held that the

[109] 2000 (2) MPWM 77 MP
[110] 2000 (1) Vidhi Baswar 123 MP

Muslim law makes the husband liable for the maintenance of his divorced wife during *Iddat* only. It seems that this judgment of Court also supported the traditional view of Muslim Personal Law that the liability of the Muslim husband to maintain his divorced wife is only for the duration of *Iddat.* Thus the legal status if the right of the divorced wife continued to be fluid variable according to the views of different High Courts. The main contentious issues were:

I. Whether the fair and reasonable provision was in additions to the maintenance allowance or included in it, i.e. quantum of maintenance.

II. The duration of time for which the husband liability extends whether within *Iddat* or beyond *Iddat* period.

No doubt, the Muslim divorcee's fate was a progressive path:

- In the first stage the husband could get rid of himself of all liability by simply divorcing her.
- The second stage was the 1973 amendment in the Criminal Procedure Code which laid down that husband was liable to maintain her even after Talaq; this was her first stage of acquirement. But the husband found an escape value which was the payment *of Mahr.*
- In the third stage, the Judiciary insisted on making this *Mahr* reasonable.
- The forth stage came when the court insisted on her maintenance, whether *Mahr.* Is given or not.
- The fifth stage was marked by Act of 1986.

The uncertainties, which were led by the different decisions of the various High Courts had to be settled. The verdict of Supreme Court in *Danial Latifi v. Union of India,*[111] deciding some of the unsolved questions. Issue before the Hon'ble Supreme Court was whether Muslim Women (Protection of Rights on Divorce) Act, 1986 is an unconstitutional on the ground that it infringed Articles 14, 15 and 21 of the Constitution? Contentions of Petitioner were the following:

(i) Section 125 Cr. P.C. is a provision made in respect of woman belonging to all religions and the exclusion of Muslim woman from its benefit would be discrimination between woman and woman.

(ii) A part from the gender justice caused in the country this discrimination further leads to a monstrous proposition of nullifying a law declared by this court in Shah Bano's case. Thus there is the violation of equality before law but also the equal protection of law and inherent infringement of article 21 of the Constitution as well as basic human values.

(iii) If the object of Section of 125 Criminal Procedure Code, 1973 is to avoid vagrancy, the remedy there under can not be denied to Muslim woman.

(iv) The Act is un-Islamic, un-Constitutional and it has the potential of suffocating the Muslim woman and under mines the secular, character which is the basic feature of the Constitution.

(v) There is no reason to deprive the Muslim women from the

[111] (2001) 7 SCC 740; 11 (2001) DMC 714

applicability of the provision of Section 125 Cr.P.C., and consequently, the present Act must be held to be discriminatory and violative of Article 14 of Constitution.

(vi) The conferment of the power on magistrate under Section 3 (2) and Section 4 of the Act is different from the right of a Muslim woman like any other woman in the country, to avail of the remedies under Section 125 of Cr.P.C. and such deprivation would make the act unconstitutional as there is no nexus to deprive a Muslim woman from availing remedies under Section 125 of Cr.P.C., not with standing the fact that the conditions precedent for availing of the said remedies are satisfied.

The Contention of respondent in the support of the impugned act, were the following:

(i) Where a question of maintenance which forms parts of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act , it is provided that a reasonable and fair provision to be made *and paid by her* former husband within the period *of Iddat* and when the fact has clearly been stated in the provision , the question of interpretation as to whether it is for life or for the period *of Iddat* would not arise.

(ii) The personal law of any community is a legitimate basis for discrimination, if at all and therefore does not offend Article 14 & 21 of the Constitution.

(iii) The parliament enacted the impugned Article respecting the

personal law of the Muslims and that itself is a legitimate basis for making a differentiation; that a separate law for community on the basis of personal law applicable to such community can not be held to be discriminatory.

(iv) The Act resolved all issues, bearing in mind the personal law of the Muslim community and the fact that the benefit of Section - 125 of Cr.P.C have not been extended to a Muslim woman would not necessarily lead to a conclusion that there is no provision on the Act to protect the Muslim woman from vagrancy and from being a destitute.

The Hon'ble Supreme Court by analyzing these points held that Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down two separate and distinct obligations on the part of the husband, viz,

(i) To make reasonable and fair provision for his divorced wife,
(ii) To provide maintenance for her

The emphasis is not on the nature of duration of any such provision or maintenance, but on the time by which an arrangement for the payment of provisions and maintenance should be concluded namely, 'within the *Iddat* period'.

The Court upheld the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 and observed in para 31 as under:

"Para 31 - Even under the Act, the parties agreed that the provisions of Section 125 of Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred the power to make appropriate

provision. Therefore, what could be earlier granted by Magistrate under Section 125 of Cr.P.C. would now be granted by the magistrate under the very Act itself.

The Court finally concluded in para 36, while upholding the validity of the Act. We may sum up our conclusions:

(i) A Muslim husband is liable to make a reasonable and fair provision for the future of divorced wife which includes her maintenance as well. Such provisions extending beyond the *Iddat* period must be made by the terms of Section 3(1) (a) of the Act.

(ii) Liability of the husband of maintains his wife under Section 3(1) (a) of the Act is not confined to *Iddat* period.

(iii) A divorced Muslim woman, who has not remarried and who is not able to maintain herself after the *Iddat* period can proceed under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, from such divorced woman including her children and her parents. In case of any of the relative being unable to pay maintenance, Magistrate may direct the State Waqf Board, established under the Act to pay maintenance.

(iv) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution.

This judgment can be said the commendable and praiseworthy step of the Supreme Court to upheld the Constitutional validity of the Muslim

Women (Protection of Rights on Divorce) Act, 1986 and paid due regard to the feelings of the minority community, i.e., the Muslim Community. As the right of the preservation of personal law is the fundamental right of any community, on that ground the Muslim Women (Protection of Rights on Divorce) Act, 1986 can not be called to run counter to the constitutional mandate. But besides it, it can also be said that in the guise of Judicial activism the court has given the liberal meaning to term within under Section - 3(1) (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 by making the husband liable to make fair and reasonable provision within the *Iddat* period, for beyond the *Iddat* period. It must be noted that the making of the future provision beyond the *Iddat* period for the maintenance of the divorced Muslim wife is foreign to Muslim Personal Law. Indian Muslims have their deep feelings and emotional attachment to their personal law, so it can also be said here that the sorry position is that even the Apex court was no more hesitant to venture in the areas well understood and free from legislative *activity*. It is to be noteworthy that as the court refers the question of Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for upholding the constitutional validity of the same, is appreciable. This step of the court tried to avoid the jurisdiction of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

After the judgment *of Denial Latif's* case a very interesting question came before the Bombay High Court in *Sayeed Khan Faujdar Khan v. Zaheba Begum,*[112] the question was that, can a divorced Muslim wife who withdraw an earlier application under Section 125 of Cr.P.C., on

[112] AIR 2006 Bom. 39.

the basis of settlement, subsequently claim maintenances under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that earlier settlement made by the parities was binding on the parties. The wife's application under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 is nothing but an abuse of the process of the court. A consent order or settlement arrived between the parties in proceeding under Section 125 of Cr.P.C., operates as estoppels and no party can be allowed to Muslim or abuse the process of court by filing subsequent application under a different act for the same relief, on the same set of facts or circumstances.

Recently in 2007 a very interesting question came before Bombay High Court that whether a divorced Muslim wife alone can apply for the maintenance from her husband under Section-125 of chapter IXth of Criminal Procedure Code, 1973 in *Seikh Mohammad V. Naseem Begum,*[113] the Hon'ble High Court held that Muslim divorced wife alone cannot apply for the maintenance under chapter IXth of Cr.P.C., she can only apply under this chapter IX, Section 125 of Cr.P.C,, when there is an agreement between her and her husband under Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been designed to mean that no proceeding can be initiated on the application of Section 125 of Criminal Procedure Code, 1973 by divorced Muslim wife unless there is an agreement between her and her husband to be governed under Section 125 of Criminal Procedure Code, 1973. Application of the Section 125 of Criminal Procedure Code, 1973 is maintainable subject to the

[113] (2007) DMC 226 Bombay High Court.

mandate of Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Virtually the judgment of the court is good as it held that the purpose of the enactment of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 must be fulfilled. The contrary view of the court would have under that Section otiose. Here the High Court relied on the Judgment of Supreme Court in *Denial Latifi v. Union of India,*[114] in which court upheld the validity of Muslim woman Act, 1986.

In *Riaj Fitima and Another (Petitioner) v. Mohd. Sharif*[115] *[Respondent]*, the issues before the Hon'ble High Court of Delhi were:

(i) Whether the statement of divorce taken by the husband in the written statement sufficient to constitute divorce?

(ii) Whether in the absence of direct and insufficient evidence to prove divorce, the bar of the Act of 1986, be made applicable in entertaining application of maintenance under Section 125 of Cr. P.C.?

The petitioner alleged that she was still the wife of the respondent and she was turned out of the matrimonial home for the want of dowry.

Respondent husband contended that he had obtained divorce from his wife by the Mufti. He also alleged that in view of the divorce the petition was debarred from claiming maintenance under Section 125 Cr. P.C. Instead of the remedy of the petitioner was to take recourse to

[114] II (2001) DMC 174
[115] (2007) DMC 26 Delhi High Court

the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 as under:

So far as the first issue was concerned it was laid down that mere statement of the husband taken in a written statement that he had divorced his wife on a particular date would not suffice. If this accepted it would be prone to misuse. The court laid down the following perquisites for proving that divorce had taken place:-

- Divorce must be for the reasonable cause.
- There must be a proclamation of Talaq thrice in the presence of witnesses.
- There must the proof of the payment of *Mahr.*
- The husband must prove that there was attempt for conciliation prior to divorce,

As far as the second contention is concerned the court relied upon on *Salim Basha v. Mumtaz Begum,*[116] where Madras High Court opines that Talaq was not valid if there was no valid evidence of pre-divorce conference for the settlement by two mediators from both sides. The Court held that respondent could not proved that he had divorced his wife and, thus the bar of the Act of 1986 was not applicable in entertaining the application of the petition under Section 125 of Cr. P.C.

This judgment is based on the Judgment of the Supreme Court in *Shamim Ara v. State of U.P.*,[117] wherein the court held that' *Talaq* to be

[116] 1991 (Criminal)
[117] J.T. 2002 (7) SC 570

effective has to be explicitly proclaimed'. Thus in the present social welfare context the judgment is praiseworthy as it lays down that for a valid *Talaq* the prerequisites of the valid *Talaq* must be fulfilled. It will be helpful in the future to reduce the abuse of the authority of the Muslim man of giving his wife divorce arbitrary and in rash manner. Here it was clearly settled that mere the written statement of the husband that he had divorced his wife on a particular day will not be sufficient to prove divorce.

In *Tripura Board of Waqf* (petitioner) *v. Ayesha Bibi*[118] *[Respondent],* the issue before the Gauhati High Court was that whether the Waqf board can be directed to pay maintenance amount without offering a opportunity of hearing before passing the order? The petitioner contended that there is no provision in the Act of 1986 to pay a maintenance allowance to a divorced Muslim woman by the Waqf Board, unless there is a specific order of competent court of law. He has submitted that before passing the initial order, the Waqf board ought to have been heard by the learned CJM.

Countering the contentions of the petitioner, the learned council for respondent submitted that the whole exercise on the part of the Waqf Board is to frustrate the claim of the respondent wife for the maintenance. As regard the notice to the Board, he has submitted that such notice is not contemplated in Section 4(2) of the Act nor in any provision of the Act, In this contention he has placed his reliance on the two decision of the Apex cast in *Syed Fatima Machrs* and *Denial Latifl's* case. The learned Judge held that the plea of the petitioner board that before passing the order, they ought to have been heard, it

[118] AIR 2008 Gauhati 10

will be suffice to say that no such provision is discernible in the Act. Section 4(2) of the Act provides that where a divorced woman is unable to maintain herself and she has no relative in Subsection 4(1) or such relatives have not enough means to pay the maintenance ordered by the magistrate or other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the magistrate to be paid by such other relatives under the second proviso to Subsection (l),the magistrate may by order direct the State Waqf Board to pay such maintenance as determined by him.

Is seems that in the present case the petitioner board instead of acting towards implementation of the object and reasons for which the aforesaid Act of 1986 was made, resisted the same making all efforts. Therefore, the court should resort to prompt implementation of the order.

Judicial Activism and its limits

The concept of judicial activism which is another name of innovative interpretation was not of the recent past. The twin concept of judicial review and judicial activism were said to be born simultaneously. The judicial creativity may yield good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences generating conflicts which may lead to the agitation to a particular community or group.

The common criticism we hear about the judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges

metamorphose into legal principles and constitutional values. On the other facet of this line of criticism is that in the name of judicial activism, the theory of sepration of powers, is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them Judicial activism can be compared with legislative activism. The latter is of two types: (i) *activist law making* ; *(ii).dynamic law making* . Activist law making implies the legislature taking the existing ideas from the consensus prevailing in the society. Dynamic law making surfaces when legislature creates an idea outside the consensus and before it is formulated, propagates it. Dynamic law making always ,ordinarily carries with it legitimacy because it is the creation of the legislatures who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle.

Thus from the above discussion on the case laws regarding the maintenance of the divorced Muslim wife, I feel that judiciary has taken the double standard in the interpretations of the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

On one side the decisions of various High Courts and Apex Court upheld the constitutional validity of Muslim Women (Protection of Rights on Divorce) Act, 1 986, but on the other side I, may fee] sorry to say that by unnecessarily *interpreting the provisions of Muslim Women* (Protection of Rights on Divorce) Act, 1986, the judiciary has tried to venture in the areas well understood and free from legislative activity.

During the process of the analysis of the background history and spirit of the Muslim Women (Protection of Rights on Divorce) Act, 1986, 1 felt that Indian Muslims have deep emotional feelings regarding their personal law. Their personal law is constitutionally recognized and judicially enforced. So that the judiciary while interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, should pay due regard to the sentiment and emotion of the Muslim community, as "religion, ethics and law are therefore, so intermixed in Islam ..... "[119]

(c) Identification of Pitfalls

The above analysis of the case shows that the role of judiciary is under the sphere of doubt regarding the implementation of Islamic personal law with respect to maintenance, divorce intestate succession despite the fact that these matters have been specifically included in Section 2 of *Sharlai* Application Act, 1937.

Specially in the matter of maintenance and divorce the steps of judiciary has been very harsh and has been touching the line of judicial distortion rather than judicial Activism.

The tendency of the Judiciary to the implementation of the Section 125 of Cr. P.C. regarding the maintenance of the divorce wife is frustrating the people of Islamic community. This step is being taken inspite of the fact that the Muslim divorced spouse can be governed by Section 125 of Cr, P.C. only when there is an agreement between them under Section 5 of Muslim Women (Protection of Rights on Divorce)Act, 1986.or the application of the secular provisions to the divorced

[119] Faizee A.A.A., Modern Approach to Islam 32 (1981 ed.) p. 36.

Muslim Spouse the judiciary has taken the innovative steps of not accepting the validity of talaq which has been give under the rules of Islamic *Shariah.As* soon as there is not the sufficient proof of talaq. The spouse comes outside the preview of Muslim Women (Protection of Rights on Divorce) Act, 1986, and the maintenance provision under secular law under Section 125 of Cr. P.C. is applied.

These cases have been recently shown in.

- *Iqbal Bano v. State of U.P.*[120]
- *Shameen Beig v. Najmunnisa Begum*[121]

The burning question is that the judiciary's steps to decided the validity of talaq is correct of which the sole authority of taking decision is with the Muslim community. It comes under the sphere of personal law which has been constitutionally recognized. The right of the application of the personal law in these matters has been specifically provided under the Section 2 of *Shariat* Application Act, 1937 by the Indian Legislature. The main pitfalls in the interpretation of Muslim Women (Protection of Rights on Divorce) Act, 1986 is, that is felt by me as a Student of personal law, the interpretation of Section 3 of this Act in such manner so as to stretch the maintenance provision beyond the *Iddat* period in the guise of future maintenance. Moreover it gas been done by the Apex Judiciary through the *Denial Latifi's* case. Now the various decisions of High Courts is recognizing the existence and validity of provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

But they are very much hesitant to cross the limits set by the apex

[120] DMC 2007
[121] DMC 2007 Bom. H.C. 738.

judiciary. The recent case[122] of Bombay High Court is the clear example of the hesitant tendency of the High Court to cross the limits set by Apex judiciary.

The pitfalls may be summed up briefly in the following manners:

- The wrong implementation of the Cr.P.C. 127(3)(b) by not taking into consideration the legislative history and intention of legislature of inserting it. The judiciary forgot that this Section was inserted to save the Muslim Personal Law.

- The solution made by the judiciary regarding the controversy of maintenance of divorced Muslim wife within *Iddat* period went against the Islamic Personal Law,

- The loopholes in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986, which provides the chance to judiciary to interpret the provisions of the Act against the Islamic Personal Law.

The indifferent behaviours of judiciary toward the Islamic Personal Law, despite knowing the fact that this community has deep feeling and emotion regarding their religi6n.

(d) Advocacy for reforms and improvements

There are some loopholes which are being felt by the scholars of the Islamic Matrimony regarding the drafting of Muslim women (Protection of Rights on Divorce) Act, 1986.

As it is very contentions issue so I want to put forth some humble

[122] Sheikh Mohd v. Naseem Gegum I (2007) DMC 226 Bombay High Court

point regarding the reforms in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986:

- The expression "who has been divorce by or has obtained divorce from her husband" used in the act includes.

  (a) Unilateral Talaq by Husband

  (b) Khula demanded by and effected at the wife's instances whether in or outside the court

  (c) Divorce by mutual consent (mubarat)

  (d) Dissolution of Marriage under the provisions of the Dissolution of Muslim marriage 1939

  (e) Annulment of void or irregular marriage.

These kinds do not have similar consequences for maintenance in different school. But Act deals with all forms of divorce without attaching importance of differences.

- The definition of term *Iddat* in Section 2(b) does not expressly state as to upon whom observing of *Iddat* is mandatory and on whose part it is not obligatory.

For example a woman divorced before consummation of marriage, is not required to observe *Iddat,* hence the clumsy definition in Section 2(a) by not excluding such woman is objectionable under Islamic rules.

- Despite the clear cut humane rule of Muslim law that Muslim law cares the maintenance of divorce who is breast feeding and child maintenance is the absolute duty of father, the Section 3(i)

(b) is the victim of confused drafting and bound to be interpreted by court *in* various ways.

- Section 3(i) (c) of the Act states that a divorced woman is entitled to "an amount equal to sum of *Mahr* or *Dower* is payable because in Islamic law there are many situations in which payment varies. The ambiguous language of said Section makes *Mahr* payable in every case of divorce.

Thus by analyzing the aforesaid loopholes of the Act which is now representing manifestly the Islamic Community to whole world, must be removed and be tried to be reformed in the line of true Islamic principles.

As the Constitution of India regards the personal laws of every community the judiciary must not assume the role of legislature and Mujtahid and does not try to venture into areas of personal laws which are well understood and free from legislative activity.

It is also to be noted that the trend which has been set by the Judiciary to maintain Muslim divorce beyond the *Iddat* period must be reviewed according to line of Islamic *Sharia.* As this concept is foreign to the spirit of Islamic law. The reason is that there is no any interfamiliar transfer of girl on marriage unlike Hindu family.

4.4 MAINTENANCE OF WIFE UNDER CHRISTIAN LAW

(a) Analysis of legislative provisions

Maintenance of wife under Christian Law is dealt with the Section-36, Section-37 and Section-38 of the Indian Divorce Act, 1869. Section 36 of Indian divorce Act, 1869, deals with the petition for the expenses of

the proceedings and alimony pending the suit. According to this Section, in any suit under this act whether it be instituted by a husband or a wife and whether or not she has obtained an order of protection, the wife may present a petition for the expenses of the proceedings and alimony pending the suit.[123] Such a petition shall be served on the husband and the court on being satisfied by the truth of the statement contained therein, may make such order on the husband for the expenses of proceedings and alimony pending the suit as it may seem just.[124] There is a proviso in this Section which says that the petition for the expenses of the proceeding and alimony pending the suit shall as far as possible, be disposed of with in the sixty days from the date of the service of notice on the respondent.[125]

The object of this Section is to provide the wife with a source of maintenance, whilst a matrimonial suit is pending. She is entitled to present a petition of alimony *pendente lite.* Alimony *pendente lite* is an *ad interim* arrangement and its payment is enforced on the ground of necessity and only when the wife has no other means of subsistence. Where pending her application for alimony the wife gets advances from a third party to meet her necessaries the third party is in equity entitled to recover the sums advanced by him from the husband. The alimony may be claimed by the wife in suits for (i) Nullity (ii) Dissolution (iii) Judicial Separation (iv) Restitution conjugal rights of marriage.[126]

A husband should file an oath to a petition for alimony by the wife. He

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[123] Substituted for the word "for the alimony pending suit by Indian Divorce (Amendment) Act, 2001

[124] By Amending Act of 2001

[125] Inserted by the Amending Act of 2001.

[126] Weingarten v. Engel 1947, All ER 425

must state his gross income. He must specify deductions of any that he claims and it is not sufficient for him merely to state his net annual income.[127] A husband who does not file an answer to the petition can not be allowed to cross examine witnesses produced by the wife in support of her alimony petition nor can he give any rebutting evidence. Husband may plead that his wife has income and property. It is to open to the husband to plead that the wife is being supported by the co-respondent and is not entitled to alimony *pendente lite. He* may also plead that the wife has been living separate for many years before the institution of suit and she has supported herself during the separation and is still able to do so. The husband is not allowed to put any question direct or indirect with regard to her adultery. The averment of adulatory in answer to a petition for alimony is irrelevant and the court is bound to presume that the wife is innocent till she is proved guilty. An alimony petition should be made at the earliest opportunity, as delay may go to show that the wife has a means of subsistence and is not in any need of alimony.

The Indian law is quite clear that in case of a suit for divorce or for nullity of marriage, the order for alimony remains operative only till the decree is made absolute or is confirmed. In case of a suit for the restitution of conjugal rights the order for alimony *pendente lite* extends upto the time allowed to the husband for complying with the decree or till such times she refuse to comply with it. The quantum of alimony that should be awarded to a wife will depend on the facts and circumstances of each case. The parties may mutually agree to the amount. The Indian law with regard to the quantum of alimony

[127] Nankis v. Nankis 33 L.J. p. 24

pendente lite that the alimony *pendente lite* should in no case exceed 1/5th of the husband's average net income for the past three years. The general rule regarding the commencement of payment of alimony is that it commences from the date of the service of the petition on the husband and not the date of the return of the citation. The Indian law is quite clear that alimony shall continue till such time as the decree is not made absolute or is confirmed by High Court. The Act contemplates the payment of alimony to the wife so long as she continues in law to be a wife.[128]

The Indian Divorce Act, 1869 is silent as to the mode of the enforcement of decrees and an order for the payment of alimony *pendente lite* must be made according to the provisions of Civil Procedure Code , 1908 for the execution of decrees.

An order for *alimony pendente lite* does not create a legal debt, but a liability to pay and is only a personal allowance and so long as the order subsist the right to alimony can not be alienated or released. When a marriage has been validity terminated under the law of the parties domicile, any maintenance order made by the court other than the court of parties domicile, must also comes to an end.[129]

Section 37 of the Indian Divorce Act 1869, deals with the petition of permanent alimony. This Section empowers the High Court and District judge to order that the husband shall secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune. This order may be made by the High Court or District Judge, if it thinks fit, on

[128] Manchanda, The law and Practice of Divorce (ed. 2nd, 1958, Allahabad), pp. 303-304
[129] Id. pp. 305, 306.

any decree absolutely declaring a marriage to be dissolved, or any decree of judicial separation obtained by wife. In every such case the court may make an order on the husband for payment to the wife of such monthly or weekly sum for her maintenance and support as the court may think reasonable. There is also a proviso in this Section which provides that if the husband afterwards from any cause becomes unable to make such payment, it shall be lawful for the court to discharge or modify the order or temporarily to suspend the same as to whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit. This Section empowers the court to order for the permanent alimony or permanent maintenance after a final decree for judicial separation or dissolution of marriage has been granted. The District Judge is also given the same power after the decree passed by him has been confirmed by the High Court.

The court may order the payment of such permanent alimony or maintenance in three ways:

1) It may secure a gross sum of money

2) It may provide an annuity for wife life

3) It may order the husband for the payment of monthly or weekly sum for her maintenance.

The proviso to the Section gives the court a power to vary, discharge, modify or temporarily suspend the payment order, if the husband subsequently becoming unable to make such payment.

There is no hard and fast rule as to the quantum of alimony that should be given to an innocent wife. The law has laid down no exact proportion. The allocation of alimony is a matter for the discretion of the court to be exercised upon a consideration of all the circumstances of the case.[130] As a general rule permanent alimony may be more than alimony *pendente lite.* There are some factors of which Section 37 of the Indian Divorce Act, 1869 enjoins the court. The factors are:

(i) The conduct of the parties before and after marriage.

(ii) The nature and source of husband

(iii) Fortune of the wife, if any, and other circumstances of the case.

The usual rate of permanent alimony is one third of joint net income. The court in this matter is guided by the practice of the ecclesiastical courts. However, the court has the discretion and may award less than one third of the joint net income, if the circumstances so warrant. But the court will not grant more than one third unless exceptional circumstances exist.

The permanent alimony may be increased or decreased by the court according or the changing circumstance and the fortune of the parties.

Permanent maintenance may be claimed by an application filed at any time after the decree nisi. In any event no order for permanent maintenance can take effect prior to the passing of the decree absolute. An application after final decree may be made within the two months of the final decree; but it may be filed even subsequently with the leave

[130] Id. p. 310

of the court. The petition for the permanent maintenance must be served on the opposite party

Section 38 of the Indian Divorce Act, 1869, deals with the rules regarding the payment of alimony. According to this Section, in all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf. The Court may impose any terms or restrictions which to the Court seems expedient .Thus this Section lays down the mode of payment of alimony. The court is given power on making an order for alimony, be it alimony *pendente lite* or permanent alimony. Alimony may be paid wither direct to the wife herself or to her trustee. Such trustee, must however be approved by the court. The court is given power to impose any term or restrictions on the payment of alimony and may appoint new trustee from time to time. The whole object of this Section is to ensure that the wife receives the allotted alimony.

(b) Evaluation of Judicial Pronouncements

As it has been mentioned earlier that only landmark and trendsetter judicial decisions in the Indian context are being shown and discussed here. Since the Christians are not the majority in India population is less and the number of litigation and reported cases are almost negligible. There are not any recent cases regarding the maintenance of wife which can be termed as landmark and trendsetter. This community is also peace loving and satisfied like the Parsi community. Thus, though having the many loopholes in the drafting of the Christian laws regarding the matrimonial causes and maintenance, there is not any huge controversy like other communities.

(c) Identification of Pitfalls

The need for reforms in the Indian Divorce Act enacted as early as 1869 has long been felt and advocated by the public, jurist, the law commission and the judiciary, including Supreme Court.

It is note worthy that the ground for divorce under the Act were too limited and harsh too before the insertion of Section 10 A as amended in 2001.

Even as between husband and wife there is discrimination as under Section 10, the husband has simply to prove adultery where as the wife has to prove another matrimonial offence along with adultery, for granting relief.

There was another lacuna which is not suitable as per the present conditions of the society that a dissolution decree passed by the District Court needs to be confirmed by the High Court. It makes the procedure of divorce complicated and time killing. *[Requirement of confirmation by the High Court has now, been dropped the Divorce Act, 2001].*

Besides these shortcomings there are also some shortcomings in the drafting of the Indian Divorce Act, 1869 which is shown by the fact that the Act considers the wife as a property of the husband. Who under Section 34 of the Act, is entitled to claim damages from the wife's adulterer.[131]

The Act was also discriminatory on the basis of religion. While under all other personal laws cruelty and desertion, inter alia are the grounds

[131] Kusum, Marriage & Divorce Law Mannual (ed. 2000, Delhi) p. 28

for divorce but under this Act, there are only ground for judicial separation. Thus a Christian married wife under the Act was expected to endure all sort of cruelties without any right to seek divorce where as "wife married under the Hindu or the Parsi Marriage Law, is entitled to divorce, may be even in less unbearable situations.[132]

As early as Section 10, was challenged as illegal discrimination on the ground of gender in *Dwarja Bai v. Ninan*,[133] the court however dismissed the plea and observed (obiter).

> "..... *I consider that Section 10 as it stands is not prima facie repugnant to Articles 13 and 15 of the constitution. It appears to be based on a sensible classification and after taking the abilities of the man and woman and the result of their Acts, and not merely based on sex, when alone it will be repugnant to the constitution...*

(d) Advocacy for Reforms and Improvements

The issue relating to the changes in the Indian Divorce act, 1869 has been hanging for more than forty years. Various law commissions in their reports stating with the 15th report as well as various High Courts, such as the High Courts of Mumbai, Chennai, Andhra Pradesh, Kolkata and Kerala has emphasized the need for bringing about gender equality in the matter on grounds of divorce as available to the Christian spouse. It was also painted out that there was no need for a provision which required confirmation of decree for dissolution of marriage by the High Courts. In the Indian Divorce (Amendment) Bill 2001, the Government had sought to bring about gender equality by amending Section 10, Section 17and Section, 20 to do away with the

[132] Jorden Deingdeh v. S.S. Chopra AIR 1985 SC 935.

confirmation by the High Court of decree of divorce or nullity of marriage.

Other provisions of the Indian Divorce Act, 1869, were also sought to be amended to make certain consequential changes. The Governments approach in the matter was to bring about minimal changes in consonance with ruling of the courts and uniformity of law among Christians.

A provision has been made for the dissolution of marriage by mutual consent. This is an the lines of Section 13(b) of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954

Section 7 of the Indian Divorce Act, 1869 which provides that the High Courts and the District court shall act and give relief on the principles applied by the English Courts has been deleted since after attaining independence, this provision seems to have become redundant. Section 34 of this Act which provided *that* the husband may claim damages for adultery in a petition limited to that object, and the ground of his wife having committed adultery has been deleted.

Section 35 of this Act provided that where in a petition by the husband, the alleged adulterer was made a co-respondent and the adultery is established, the court may order the respondent (adulterer) to pay the cost of the proceedings. This provision has also which provides that the alimony *pendente lite* shall not exceed one fifth of the husband's average net income for the 3 years, the next proceeding date of the order has also been deleted.

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[133] AIR 1953 Mad. 792 at 800.

Section 10 for which there were objections by the jurists that it wee against the gender equality. It has now been modified after the Personal Laws Amendment,2001, both husband and wife can seek a divorce on the grounds of-

(i) Adultery
(ii) Cruelty
(iii) Insanity for more than 2 years
(iv) Incurable leprosy for more than 2 years
(v) Conversion to another religion
(vi) Willful refusal to consummate marriage
(vii) Not being heard of for 7 years
(viii) Venereal disease in communicable stage from for 2 years
(ix) Failure to obey the order for the restitution of conjugal rights.

However the wife has been permitted to sue for divorce of additional grounds if the husband is guilty of:

(i) Rape
(ii) Sodomy
(iii) Bestiality

All there years, Christian Spouses were compelled to mudslinging each other even if they desired to for in for divorce due to the non establishment of grounds. Now Section 10-A is added under which mutual consent has also been made a ground for divorce.

Thus it can be said that after the Indian Divorce (Amendment) Act, 2001, is a great step for the improvement of the lacunas in the drafting of old Act.

It has adopted the good features of Hindu Marriage Act, 1955 and

Special Marriage Act, 1954. The present situation of the Christian law thus can be said to be satisfactory.

4.5 MAINTENANCE OF WIFE UNDER PARSI LAW

(a) Analysis of the Legislative provisions

Maintenance of wife under Parsi Law is dealt with the Parsi Marriage and Divorce Act, 1988. The relevant provisions of this Act regarding the maintenance of wife are: Section 39, Section 40, Section 41 and Section 42. Section 39 of the Parsi Marriage and Divorce Act, 1988, deals with the alimony *pendente lite.* This Section empowers the court to order the defendant to pay to the plaintiff, the expenses of the suit, and weekly or monthly sum during the suit, if it appears to the Court that either the wife or the husband has no independent income sufficient for her or his support and the necessary expenses of the suit. The Court, while ordering under this Section pay regard to the plaintiffs owns income and the income of the defendant. There is a proviso in this Section which provides that the application for the payment of expenses of suit shall be disposed of within 60 days from date of service of notice on the wife or the husband as the case may be.[134] Alimony *pendente lite* as a temporary provision for the wife or the husband awarded by the court, ordering the husband or wife, as the case may be to pay alimony *pendente lite.* In order to obtain alimony *pendente lite* and expenses of proceeding, the wife or the husband has to prove following conditions that:

1) She or he has no independent income.

2) Her or his income is not sufficient for her or his support and the

[134] Subs by the Marriage laws Amendment Act, 2001 [Act No. 49 of 2001].

necessary expenses of the suit.

Where neither party (husband or wife) has mean to meet the expenses of other party, no order may be made.[135] In granting relief under Section of Act, the court shall take into consideration:-

1) The defendants income and;

2) The plaintiff own income

Relief under Section 39 can be sought either by wife or the husband who initiated the substantive proceedings. The question as to who is the husband or wife has been interpreted by Deshpande J. of Bombay high Court while interpreting the said term with reference to Sections 24 & 25 of the Hindu Marriage Act, 1955 which are *pari materia* to instant provision. His lordship has taken the view that the expression wife as used in Section 24 and Section 25 of the Hindu Marriage Act, 1955, doesn't presupposes an existing jural relationship of husband and wife, but it merely descriptive of the person who may claim to any other relief which can be granted under Hindu Marriage Act, 1955.[136] Alimony *pendente lite* under Section 39 can be sought during the pendency of any suit arising under the Act. When proceedings are over in their entirely, there is no question of the application of Section 39.[137] Under Section 39 of Parsi Marriage and Divorce Act, 1988, no fixation of the quantum by the legislature is made for the purpose of alimony pendent elite. It is left to the court to determine the same having regard to the income of plaintiff and defendant. Ordinary, the Court grant maintenance under Section-39 from the date of the application. The

[135] Preeti v. Ravind Kumar AIR 1979 Al 29.
[136] Hemraj Shamrao Umedkar v. Smt. Leela, AIR 1989 Bom. 146 (SC)
[137] Nirmala v. Ramdas AIR 1973 P&H 48

court should grant alimony *pendente lite* since the date of demand.[138] The judiciary is of the view that the court may grant alimony *pendente lite* from the date of the service of the notice or petition on the defendant.[139] Section 40 of the Parsi Marriage and Divorce Act, 1988, deals with the permanent alimony and maintenance, Section 40(1) of the Parsi Marriage and Divorce Act, 1988, empowers any court to order the defendant to pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of a plaintiff as having regard to the defendant's own income and other property , at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either spouse. *Any such payment may be secured if* necessary by a charge on the movable or immovable property of the defendant, if it may seems to the court to be just. According to Section-40(2) of the Parsi Marriage and Divorce Act, 1988, if the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Subsection (1), it may, at the instance of either party, vary, modify, or rescind any such order in such manner as the court may deem just. According to Section-40(3) of the Parsi Marriage and Divorce Act, 1988, if the Court is satisfied that the party in whose favour an order has been made under this Section has remarried or if party is husband, had sexual intercourse with any woman outside wedlock, it may at the instance of other party vary modify or rescind any such order in such manner as the court may deem just. This Section aims at providing for permanent alimony and maintenance to the husband or wife, whoever is in need of the same.

[138] Pratima v. Kamal (1964) 68 CWM 316.
[139] Sudharshan Kumar v. Chhagar Singh (1978) Kash. L.J.

This relief would be available only when a decree for judicial separation or restitution of conjugal rights or divorce or nullity of marriage has been passed by any court exercising jurisdiction under this Act. An order under Section 40 can be passed: (a) either at the time of passing any decree, or (b) at any time subsequent thereto. No order can be passed under Section 40 if the substantive petition is whether dismissed by the court,[140] or withdrawn by the petitioner.[141] While passing under Section 40 (1) of the Act, it is obligatory upon the court to have regard to the conduct of the parties of the case. The conduct of the parties does not mean merely the conduct of the party who is applicant for maintenance, but also of the other spouse in relation to their life together as husband and wife.[142] Permanent alimony can be granted even to an erring spouse and the fact that the wife did not comply with the restitution of conjugal right can not by itself disentitle her to claim permanent alimony.[143]

Doubtless, the conduct of the parties any be factor in deciding claim or permanent alimony, but each case has to be decided on its own merits, it is not correct to say that grant of judicial separation on the ground of cruelty of the wife, is a bar to her getting permanent alimony.[144]

Section 40 of the Parsi Marriage and Divorce Act, 1988, Act puts stress on the conduct of the parties during the matrimonial life and the court pays due regard to that factor. Section 40 (1) and (3) place considerable emphasis on wife being chaste not during matrimonial tie but also after the decree to retain her eligibility for the purpose of

[140] Mazumdeet v. Mazumdar, AIR Cal 428.
[141] Shanta Ram v. Hirabai, AIR 1962 Bom. 27.
[142] Lalithamma v. R. Kanan AIR, 1966 Mys. 178.
[143] Premji v. Rai Sarkar Kanji AIR 1968
[144] Shabbir, Mohd., Parsi Law in India (ed. 5th, 1991, Allahabad), p. 111.

maintenance. Now in view of the Phrase -"the conduct of the parties and other circumstance of the case," under Section 40 (1) of the Act, the courts are duty bound to take into consideration the health of applicant and source of income and if court satisfied that she is in poor health and has no sources of income and there is no one to look after her, maintenance should be granted though she had been guilty of adultery and divorce was granted on that ground.[145] The Madhya Pradesh High Court opined that where the conduct of wife is unchaste; the question of alimony or maintenance does not arise.[146] It is clear from the above discussion that regarding the relevancy of the conduct of the parties in deciding claim of permanent alimony, each case should be decided on its own merits. In fixing the amount of maintenance under Section 40 of the Act the court is required to consider the following matter:

(a) Income and property of the party who is required to pay.
(b) Income and property of the non claimant
(c) Conduct of the parties
(d) Circumstances of the case.

Under Section 40 of the Parsi Marriage and Divorce Act, 1988, the court can order one party to pay the other for the maintenance and support:

(a) A gross sum
(b) A sum to be paid monthly
(c) A sum to be paid periodically.

The status of the husband and wife must be taken into account and not the status of father or any other relations.

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[145] Jain, SC. The law relating to Marriage and Divorce, (ed. IInd, 1980, Delhi) p. 195.
[146] Lila Devi v. Manohar Lal AIR 1959 MP 349.

According to the practice of English courts, which generally influences our judicial activity, the monthly allowance that the defendant may be ordered to is one third of his or her income. In some case Indian Judiciary has followed this English Rule. The one third rules is merely a guideline and there is no rigidity about it.[147]

The court is competent to fix more than one third or less than one third in a given case depending the circumstance of the case. The court under Section 40 (2) and (3) is empowered to vary, modify or rescind its order passed under Section 40 (1) of the Parsi Marriage and Divorce Act, 1988, Act in any of following circumstances:

- If the court is satisfied that the party in whose favour an order has been passed, has remarried ; or
- If such party is wife, that she has not remain chaste; or
- If such party is the husband, that he had sexual intercourse with any woman outside wedlock.

Thus, in view of the change in circumstances of either party at any time after it has made an order under Section 40 (1), the court may vary, modify, or rescind at the instance of either party in such manner as the court deem just,

(b) Evaluation of the Judicial Pronouncements

As it has been mentioned earlier that in this dissertation only landmark and trend setter judicial decision has been put forth. Since the Parsi community is a self satisfied community with the position of their

[147] Supra Note 144, p. 114.

existing laws, the number of litigation cases is almost negligible regarding the maintenance of wife which can be said a trend setter and landmark. This community is peace loving and has been free from the controversies we see and had been watching in the other communities. There is no denying the fact that the modern and forward looking approach of the Indian Parses is praiseworthy. The self contentment of the Indian Parses is undoubtedly a challenge to the other communities.

(c) Identification of Pitfalls

It is a well known fact that the Parsi community is a self satisfied community towards their laws. It is a very progress looking community and deals mostly matters according to their customs. The Parsi Law regarding the Marriage, divorce or the matrimonial relief has been amended in 1936 and 1988. The original Act[148] was passed at the express representation of the Parsi community. The Parsi Marriage and Divorce Act, 1936, has amended the original Act, i.e., 'the Parsi Marriage and Divorce Act, 1865'.The original Act was based on the recommendation of the marriage committee of the Parsi Law Association. The provisions of the Act were essentially based on the Matrimonial Causes Act, 1858. As a general rule there is a presumption that the Parsi is governed by English common law.[149] The Parsi Marriage and Divorce Act, 1936 was also amended in 1988 and the same is known as the Parsi Marriage and Divorce (Amendment) Act, 1988.

Some pitfalls in the original Act i.e., the Parsi Marriage and Divorce Act, 1865, were found by the Parsi community whose sentiments and

[148] See Ardasar v. Arabai 9 Bom. 290.
[149] Naroji v. Roges 4 Bom. HCRI; Bai Manek Bai v. Bai Meerbai 6 Bom. 363.

values was for the time being governed by the Act of 1865. They desired a variation in their legal resolve. The Act of 1865 had been obtained after sincere endeavour of the community, yet the legislation which followed the model of the British Matrimonial Causes Act, 1857, had featured that had became repugnant to the conscience of the community, e,g., adultery or adultery coupled with some other matrimonial offence were the extreme circumstances entitling the aggrieved party to a divorce, the remedy of judicial separation was available only to the wife etc.

It was the background that the Act of 1936 sought. The model of the Act of 1936 largely follows that of its predecessor. It provides for matrimonial remedies of divorce, dissolution and annulment of marriage. Contemporary views of the community called for updating the law. As a result the Parsi Marriage and Divorce (Amendment) Act, 1988, was enacted. This incorporates the advantageous aspect of the Hindu Marriage Act, 1955, the Indian Divorce Act 1869; the Special Marriage Act 1954 the Matrimonial causes act, 1965 and the Dissolution of Muslim Marriage Act 1939.

(d) Advocacy of Reforms and Improvements

We have analyzed that the contemporary view of the Parsi Community called for updating the law. The result is the Parsi Marriage and Divorce (Amendment) Act, 1988. This incorporates the advantageous aspects of the Hindu Marriage Act, 1955, the Indian Divorce Act, 1869, the Special Marriage Act, 1954, the Matrimonial Cause Act 1965 and the Dissolution of Muslim Marriage Act, 1939.

The remedy of divorce by mutual consent has been extended in favour

of Parsi Spouses. The relief of alimony *pendente lite* and permanent alimony technically known as ancillary relief is available to both spouses without any discrimination on the basis of sex.

It shows that the Indian Parsi have shown the forward looking and Modern approach towards their personal law. They have shown their willingness to adopt the good and beneficial provisions from many sister communities. There is no hesitation in the Parsi community to adopt the beneficial provisions from any sister community.

It is to be a noteworthy fact that the population of the Parsi community is very much lesser than the other communities in India. They are peace loving people and satisfied with their existing laws. Due to these reasons the number of the litigation cases in India is very much negligible.

From the above discussion it can be concluded that the modern and forward looking approach of the Indian Parsis are praiseworthy. The self-contentment of the Indian Parsis is a challenge to the other Indian minorities as their successful survival need the desirability of the rational rethinking regarding the fate of their personal laws particularly against the complexities of contemporary era. The discussion is clear from the fact that at one hand there is a plethora of cases in Hindu and Muslim community regarding the matrimonial causes which exert a lot of pressure of the judiciary, on the other hand the cases of Parsi community is almost negligible.

Therefore it seems to be correct to conclude that the present law system of the Parsi community is satisfactory and not many instant reforms are needed regarding the maintenance of wife.

Part-III

EMPOWERMENT OF WOMEN THROUGH LEGISLATION IN POST-INDEPENDENT INDIA: EVALUATION OF RELEVANT LEGISLATIONS

Chapter-1: Empowerment of Hindu Women in Post-Independent India

Chapter-1

EMPOWERMENT OF HINDU WOMEN IN POST-INDEPENDENT INDIA

1.1 INTRODUCTORY REMARKS

At the time of Independence before the Constitution of India came into force, some reforms in the State of law were carried out by the British rulers at the instance of Indian social reformers like Raja Ram Mohan Roy. The concept of the women being dependent, powerless and needing a charitable consideration rather like dumb animal who on humanitarian grounds, must not be mistreated, was still holding ground. This is despite some great men and women who worked as equal and comrades and considered each other so, in the Freedom movement itself. It is observed that:

Since Independence, All India Women's Conference became interested in constructive work and left its agitational attitude of pre-independence era. Its activities since Independence led to the enactment of some legislations concerning women. Some significant ones are: Act of Woman's Legal Rights, 1952; the Suppression of Immoral Traffic in Women and Children Act, 1954; the Special Marriage Act, 1954; the Hindu Marriage and Divorce Act, 1956; the Hindu Minority and Guardianship Act, 1956; Intestate Succession Act 1956; the Orphanages and Widow Home Act [The Orphanages and other Charitable Homes (Supervision and Control) Act, 1960] and the Dowry Prohibition Act, 1961[1]

[1] Neelanrt Upadhayay and Rekha Pandey: "Women in India-Past and Present", p. 41, First Published, 1990.

In post-Independence India, the Legislature took a more positive attitude in the matter of law reform and undertook to enact some of the measures which the British administrators were hesitant to undertake. The Hindu legal system was based on a rigid caste system. The caste system however, broke down, and came to be regarded as an anachronism, in course of time, as result of the release of new political and social forces. People began to think in a limited way in terms of a classless and casteless society. As a consequence, many old principles of Hindu law perpetuating the caste system needed to be done away with. The Hindu Marriage Validity Act, 1949, constituted a great step in this direction. It came to validate inter-caste marriages.[2] Before 1949, there was some confusion on the point and a few High Courts declared such marriages void.[3] The Act of 1949 removed this confusion and declared such marriages as valid and thus sought to help in the consolidation and integration of the Hindu society. It was no doubt a step forward towards the evolution of a casteless society which is the great need of the day in India.

The Constitution of India came into force in 1950 guaranteeing Indian citizens and non-citizens certain basic human rights as fundamental Rights. Article 14 of the Constitution of India guaranteed every person, equality before the law and equal protection of law within India. Article 15 of the Constitution prohibited discrimination against any person on grounds of religion, race, caste, sex, place of birth or any of these. Article 15(3) state that nothing in this Article shall prevent the state from making any special provision for women and children.

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[2] M.P. Jain: "Outlines of Indian Legal History", p. 603, 3rd Ed.., 1972

[3] *Pudiava v. Pavanasa*, ILR 1922 Mad 949; *lakshmi v. Kalian Singh*, 2 Bom. LR 128; *Padam Kumari*, ILR 1906 All. 458; *Gopikrishna v. Mt. Jaggo*, 63 IA 295.

Article 16(1) of Indian Constitution guaranteed equality of opportunity in matters of public employment for all citizens. Article 16(2) states that no citizen shall on grounds of sex, among other grounds, be ineligible for, or discriminated in respect of employment or office under the state. Under Article 19 of the Constitution the fundamental rights ensured that every citizen of India would be allowed to live, speak, write, work and travel, all over India, provided that these activities do not amount to criminal activity. It may be thought that these rights coupled with Articles 14, 15 and 16 would fully protect the rights of women. Article 25 of the Constitution allows freedom of religion has been interpreted to mean that religious custom, even if blatantly discriminating against women, will take precedence over other civil laws, particularly in two areas: 1. Marriage and the family structure, 2. Ownership of property.

1.2 HINDU MARRIAGE

The position of Hindu women in Post-Independence India under Hindu Law is improved. In a family she has the place of honour. A Hindu can not have more than one living wife. In 1955, Hindu Marriage Act was passed under which following relevant provisions have been made:

According to the Hindu Marriage Act, 1955, a marriage between two Hindus is void, if either party has a spouse living at the time of the marriage[4] or the parties are within the degrees of prohibited relationship, or the parties to the marriage are sapindas to each other. The prohibition extends to the existence of a common lineal ancestor upto the three degrees on the mother's side and upto the five degrees

[4] Sarla Mudgal (Smt.) President *Kalyani & Others v. Union of India & Others,* (19950 3 SC 635 (648, 651).

on the father's side. However, the law recognizes custom which permits marriage within the prohibited degree. This will safeguard marriage permitted in southern India of first cousins or maternal uncle and niece. Where there is no such custom, the marriage is void.

Another important ground of marriage is age. However, a marriage performed in violation of the age requirements is still valid; it is neither void nor voidable. The only special provision applicable to women is the option of puberty. That is, the women, if married when a minor, can repudiate the marriage before she attains 18 years irrespective of whether the marriage is consummated or not.

The Hindu Marriage Act and the Child Marriage Restraint Act, 1929 provide for some punishment for such marriage. Section 18 of the former provides that anyone who procures a marriage for himself or herself in contravention of sec. 5(iii) of the Hindu Marriage Act 1955 may be punished with simple imprisonment of upto 15 days or fine extending upto Rs. 1000 or both.

Under the Child Marriage Restraint Act, 1929 if a male above 18 years and below 21 years marries a girl below 15 years he is liable for simple imprisonment and fine as specified under the Hindu Marriage Act, 1955. A male above 21 years of age marrying a girl below 15 years is punishable upto 3 months simple imprisonment and also liable to fine.

Some previously prohibited marital alliances are now recognized in law. inter-caste marriage is now valid.

Under the Hindu Marriage Act, marriages between a Hindu and non-

Hindu (outside the four main religious communities of Hindus) is not possible and such a marriage will be invalid. If performed in India such marriages will be valid under the Special Marriage Act, 1954.

A marriage brought about by force or fraud may be annulled by the party whose consent to the marriage has been obtained by fraud or force. For instance, if a girl is forced or fooled into marrying a man by the actions of her father, she may apply for a decree that the marriage is invalid. The petition being presented within one year of the discovery of fraud or cessation of force. The petitioner must not have with her consent lived with the respondent as wife after the discovery of fraud or cessation of force. A marriage may also be annulled when it is not consummated, or if either party is not capable due to either mental or physical infirmity or deficiency, to perform the marriage, i.e. coitus. If either party has been mentally incompetent to consent to the marriage at the time of its solemnization, being either lunatic or idiot, the marriage is voidable. If a woman is pregnant by a third party, i.e. not the bridegroom, and the groom is in ignorance of this at the time of marriage, the marriage is voidable. The difference between a void and a voidable marriage is:

1. A void marriage is considered never to have existed, whereas a voidable marriage requires the decree of a court to declare it so, without which the marriage is binding on both parties.

2. The wife in a void marriage can not claim maintenance but a wife in a voidable marriage can do so.

3. Neither party has any rights or duties to the other in a void marriage. In a voidable marriage, however, until a competent

court has declared it so, the couple owes each other the obligations of any normal marriage. Thus a fresh marriage may legally be performed if a marriage is void but not if it is voidable.

By the marriage laws amendment Act, 1976, the Hindu Marriage Act lays down that the children of annulled voidable marriages and children of void marriages (whether declared void or not) are legitimate children. This confers legitimacy on those marriages which are void under section 11 of the Hindu Marriage Act.

If the marriage is void for any other reason such as due to lack of proper ceremonies then such children will continue to be illegitimate. The children of such marriage are heirs to their parents alone.

Section 13 and 14 of the Hindu Marriage Act deal with divorce. Section 13 of the Act states that adultery and cruelty are each sufficient grounds for obtaining a divorce. Cruelty need not be physical, and apprehension of damage to body or mind or health is also termed cruelty under this section. Menial cruelty must be such that it has adverse effects on the petitioner's health, or can be proved to have such effects in future.

Divorce may be obtained if either spouse has deserted the petitioner for a continuous period of not less than two years immediately preceding the petition, if the respondent has converted to another religion or is of either incurably unsound mind or has been suffering continuously or intermittently from mental disorder so that the petitioner cannot reasonably be expected to live with him or her. Incurable or virulent leprosy, venereal disease in a communicable form and renunciation of

the entering any religious order are grounds for divorce or should one spouse be missing for a period of seven years, without those who should normally hear of his or her existence having knowledge of it. Petition for decree of divorce may be presented by either party if there is no presumption of cohabitation within one year of a judicial separation or of a decree for restitution of conjugal rights.

Prior to 1976, there were two additional grounds of divorce for wife under Section 13 (2) of the Hindu Marriage Act. Now two more have added and there are four grounds as given below; viz:

1. Remarriage of the husband during the existence of a 1st marriage i.e. a wife living. Any wife (former or latter) of the polygamous marriage may seek divorce on this ground.

2. Husband guilty of rape, sodomy and bestiality. After 1976 two more grounds were added.

3. No cohabitation after maintenance was granted.

4. Repudiation of Marriage by the wife if she was married before 15 years of age.

The repudiation must be before she attains 18 years of age.

If the parties have been living separately for one year and state that they are unable to live together and that they mutually agree to the divorce, the marriage is dissolved.

Petitions for divorce may not be filed in the first year of marriage unless the petitioner is suffering extreme hardship, due to the extreme depravity of the other partner. Even if the grounds for relief exist,

relief may not be granted if the grounds in any way take advantage of the petitioner's own wrong doing. Therefore, if both partners are adulterous, neither is eligible to file for divorce citing adultery as cause.

The petitioner may not file for relief on grounds he or she has condoned. If for example after suffering violence from a husband, a wife willingly engaged in sexual intercourse, she is considered to have condoned the violence and may not demand relief.

The right of husband or wife to demand the return of an absent spouse has been uphold time and again. Upon filing a petition that against the express wishes of one spouse, the other is living apart, with no reasonable opportunities or conducting a normal sexual married life, the absentee spouse may be given a court order to return to the marital home. Failure to comply for a period of one year from the date of order is sufficient ground for divorce.

There is demand for deletion of section 9, Hindu Marriage Act, which has not been accepted till date.

Judicial separation is a decree whereby a husband and wife are not required to cohabit. They remain legally bound in marriage in other respect. One year of judicial separation is sufficient ground for divorce.

Daughters have equal right as sons to their father's property. Daughters also have a share in the mother's property. They have a share in the ancestral property under Section 6 of the Hindu Succession Act. When unmarried, they have rights to shelter in the parental home,

maintenance according to the income and status of their family and the right to have their marriage expenses paid out of the assets of the joint family.

A married daughter has no right to shelter in her parents house, nor maintenance, charge for her being passed on to her husband. However, a married daughter has a right of residence if she is deserted, divorced or widowed.

A woman has full rights over any property that she has earned or that has been gifted or willed to her, providing she has attained majority. She is free to dispose of her property, gift or will as she thinks fit.

A married woman has exclusive right over her stridhan property. Unless she gifts it in part or wholly to anyone, she is the sole owner and manager of her assets whether earned, inherited or gifted to her.

Regardless of her income the wife is entitled to maintenance, support and shelter from her husband, or if her husband belongs to a joint family, then from the family.

On partition of a joint family estate, she is entitled to a share equal to any other heir. Similarly, upon the death of her husband she is entitled to an equal share of his portion, together with her children and his mother.

She is entitled to maintenance from children. She is also a class I heir. All property owned by her may be disposed by sale, will or gift as she chooses. In case she dies intestate, her children, inherit equally, regardless of their sex.

Only a Hindu may adopt another Hindu under certain conditions. No persons of any other religious persuasion are entitled either to adopt or to be adopted.

An adult Hindu either male or female may adopt a child of either sex provided that he or she has no child of the same sex. The following provisions made in the Hindu Adoption and Maintenance Act, 1956 must be observed.

A major Hindu male of sound mind can adopt. He may be a bachelor, widower, divorcee or married person. For a married Hindu male consent of wife is necessary except:

1. if the wife has ceased to be a Hindu.
2. has renounced the world.
3. if she has been declared by a court of competent jurisdiction to be of unsound mind.

A Hindu unmarried woman, widow or divorcee has capacity to adopt. But a married woman cannot adopt except:

1. if her husband has ceased to be a Hindu.
2. if he has renounced the world.
3. if he has been declared to be of unsound mind by a court of competent jurisdiction.

A son may be adopted only if the adopter has no living Hindu son, grandson or great grandson, through the male line of descent. A daughter may be adopted if there is no daughter in the family. In

case of adoption of a girl, it is not permitted if the adopter has a living Hindu daughter or a grand-daughter through his son.

Consent of the spouse is necessary to validate an adoption.

In case of an adoption of a person of the opposite sex to the adopter, the age difference must be at least 21 years. That is a woman adopting a male must be 21 years older than him and so with a man adopting a female.

A guardian can exercise the power of adoption only if:

1. Both parents are dead.
2. If parents have renounced the world.
3. Parents have been judicially declared to be of unsound mind.
4. If parents have abandoned the child.
5. If parentage of the child is not known as in the case of a founding or refugee child.

The term guardian includes De jure and De facto guardian. Thus a manager, secretary or any person incharge of an orphanage or a person who has brought up the child or under whose care the child is, can give the child in adoption with the permission of the court.

An adoption may occur only when the natural parents or guardians of the adoptee give over the adoptee to the adoptive parents and the adoptive parents accept the adoptee. Without the consent and participation of the natural parents or guardians, if there are no living or responsible parents, the adoption is held to be void. A valid adoption may not be cancelled by the adoptee, his or her natural parents or his

or her adoptive parents.

The adopted person subject to certain conditions has the same right to maintenance and inheritance as any natural child. Any children of the adopted child have the same status as natural grand-children.

Adoptive parents have the same rights to maintenance in case of age or disability as do natural parents, from the child. Property rights, during the lifetime or in disposal by will, remain with the parents, as per the Hindu Succession Act.

Natural parents have rights only upto the time of the adoption. They may exercise their rights in refusing to surrender the child of adoption. However, once the adoption has occurred, the natural parents have no rights over the child.

Adoption is not permitted except of Hindus by Hindus. In the event that an adult of any other religious persuasion desires to concern himself or herself with the upkeep and well-being of a child he or she may acquire legal guardianship of the said child through a court of law. The child does not acquire the status of adoptee. Inheritance of the guardian's assets by the child can be assured only by will. In case the guardian dies intestate, the inheritance will be by normal laws of inheritance, to members of the family related by blood.

Chapter-2: Empowerment of Muslim Women in Post-Independent India

Chapter-2

EMPOWERMENT OF MUSLIM WOMEN IN POST-INDEPENDENT INDIA

2.1 INTRODUCTORY REMARKS

As regards the position of the Muslim women under Muslim law is concerned the fact is that the Muslim law has not yet been codified. In a modern society, where at least in theory, the position of women is accepted as equal it is observed that the provisions, like in most other Personal Laws are grossly inadequate.

2.2 MUSLIM MARRIAGE

The Muslim marriage is a contract between two parties of different sexes who agree to cohabit on certain terms.

The ceremony of "*nikaah*" binds the two together, unless a divorce takes place, for life. In Sunni law, the ceremony must occur in the presence of two witnesses, if it is to be valid. The presence of witnesses is not a prerequisite in Shia law. Both parties must agree to be married though, in the case of the bride, silence is interpreted as consent. Divorce is an integral part of Muslim law, as is the provision for more than one wife. Though advised against, it is accepted in religion and in Indian law that a man may have upto four wives. If he marries a fifth time, while still being married to four other women, the marriage is not void, but irregular. It may be rectified by divorcing any one of the other wives at a date later than the performance of the fifth ceremony.

Mehr is the dower or form of bride price paid by the man to the woman he marries. It is meant to protect her in case of abandonment in favour of other women, divorce, or neglect by maintaining her. According to Sunni law, if the time and mode of payment have not been specified, it is deemed payable promptly, in part, and partly deferred, the proportion of each payment being regulated by various factors such as custom, amount of dower and status of the parties. Shia law, however, regards dower as payable promptly, unless otherwise specified.

Apart from cohabiting with her husband under all normal and acceptable conditions, and his right to demand obedience from her, a Muslim woman is bound to observe purdah in accordance with the social position of the parties and local custom.

She is entitled to maintenance from the husband in a manner suitable to his economic status, regardless of her own wealth. She is also entitled to an equal share of his company and equal treatment in all respects to his other wives. She is also entitled to dower and residence at his house. She does not lose her identity, but is at liberty to deal with her property independently.

Upon death or divorce, she is bound to observe *iddat*, for duration of three courses i.e. she may not marry or engage in sexual activity for three menses. In case she is pregnant, this period extends to the duration of her pregnancy or for four months and ten days, whichever is longer.

A *muta* marriage is fixed term marriage, which, to be valid require both the specification of the duration of the marriage and the payment

of a fixed sum as dower or *mehr*. In case the period is not specified, it may be assumed that the ceremony is binding in the same way as a "nikaah" or marriage for life. This form of marriage is practiced only by the Shiite Muslims. The parties have no mutual rights of inheritance though the children are legitimate and have full rights of inheritance from both parents. In case cohabitation occurs after the expiry of the period contracted, children are still accorded legitimacy.

The marriage of Amina, a minor girl of 10 Years age, with Shekh Yahya Al Sagish, an old person of 60-65 year's age is a glaring example of the exploitation of Indian women, which has been opposed by the Government Counsels and many women organizations all over the country.[5]

Being contractually limited in time, the marriage is automatically dissolved upon expiry of the contracted term. It may also be concluded at any time by the husband, who makes a gift of the term to the wife. If the marriage is consummated, the wife is entitled to the full dower even if the contract is prematurely dissolved by the husband, but if it is not consummated she is entitled only to half. The wife may leave the husband before the expiry of the term in which case she is entitled to a proportionate part of the dower. Even in the case of fulfillment of term or the existence of children, the wife has no right to maintenance. A woman married in the *muta* form is not entitled to maintenance under the Shia Law. But it has been held that she is entitled to maintenance as a wife under the provision of Sec. 125 of the Criminal Procedure Code.

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[5] See "India Today (Hindi)" Dated 15.9.91 , p.39, "Political and Law Times", December-January Combined Issue, Year-2, Issue-1,pp. 10-11.

Either party may terminate an irregular marriage either before or after consummation. Before consummation the wife has no legal status. After consummation the wife is entitled to dower either as specified or as suitable, whichever is less, and is bound to observe *iddat*, either on divorce or upon death. Though the children have full rights of inheritance there are no mutual rights of inheritance between husband and wife. The husband is not permitted to sue for restitution of rights in such a marriage nor may the wife sue for maintenance.

Irregular marriages are those where the prohibition is temporary. These include marriages contracted without witnesses, marriage with a fifth wife, with a woman undergoing *iddat*, with a woman of a prohibited religion i.e. who is Christian, Jew, or Hindu or one with such a husband, or a marriage with a woman prohibited by lawful conjunction. In all these cases, they are removed either with passage of time, as in the expiry of the *iddat* or by divorcing the wife who constitutes the obstacle, or by the conversion of one party to the Muslim religion.

Consanguinity, affinity and fosterage are the only grounds which make void a Muslim marriage. Fosterage is the relationship established by a woman nursing child to whom she has not given birth. In a void marriage, husband and wife have no claims whatsoever on each other, nor are the children granted any status in law. Women may not marry more than one man at any time. She is liable to criminal action under Indian Penal Code, Sec. 494. Nor may a marriage occur between a pregnant woman and a man who has not caused the pregnancy.

2.3 DIVORCE

A Muslim woman may sue for divorce in the event that her husband changes his religion:

According to the Dissolution of Muslim Marriages Act 1939 the following grounds of divorce are also available to the woman:

1. The husband is missing for a period of 4 years.
2. Husband failure to maintain the wife for a period of 2 years.
3. Imprisonment of the husband for a period of 7 years.
4. Husband's failure to perform marital obligations for a period of 3 years.
5. Husband's impotency.
6. Husband's insanity, leprosy or veneral disease.
7. Option of Puberty by wife
8. Cruelty by the husband.
9. Any other grounds, recognized by Muslim Law.

A wife can sue for divorce on the ground that her husband has falsely hanged her with adultery. Also, in case the contracted payments are not made by the man to his wife, the contract itself stands as a document for divorce.

1. Divorce by husband

The Word 'Talaq' means 'to release the wife from the contract of Marriage'.

The following are the forms of Talaq by husband:

(i) Approved form or revocable form - Talaq Sunna.

(a) Ahsan-consists of one single pronouncement during the period of purity followed by abstinence can be revoked during the period of *iddat.*

(b) Hassan-consists of 3 successive pronouncements during 3 consecutive periods of purity. The 3rd pronouncement operates as a final and irrevocable dissolution of marriage.

(ii) Disapproved or Revocable form of Talaq-Talaq-e-B*iddat*-3 pronouncements in a single sentence-triple divorce.

(iii) Talaq-e-Tafwid—The husband delegates his own right of pronouncing divorce in favour of a 3rd person or his wife.

2. Divorce by Mutual Consent

Under Muslim law, a divorce may take place also by mutual consent of the husband and wife. It may take place any time whenever the husband and wife feel that it is impossible for them to live with mutual love and affection as is desired by God. A divorce by mutual consent of the parties is a unique feature of Muslim law. Under Hindu Law there was no such provision before 1976. At present Section 13-B of the Hindu Marriage Act, 1955 provides for the same. There are two forms of divorce by mutual consent: (i) *Khula* and (ii) *mubarat.*

(a) Khula

Literal meaning of the word *Khula is,* "to take off the clothes". In law, it means divorce by the wife with the consent of her husband on

payment of something to him. Before *Islam,* the wife had no right to take any action for the dissolution of her marriage. But in *Islam,* she is permitted to ask her husband to release her (as he puts off his clothes) after taking some compensation. *Quran* lays down about *Khula* in the following words:

> *"..... and if you fear that they (husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband)."*[6]

In the leading case *Munshee Buzlul Raheem vs. Luteefutoon Nissa,*[7] the Privy Council described a *Khula* form of divorce as under:

> *"A divorce by Khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and, the wife may, as the consideration, release her dynmahr and other rights, or make any other agreement for the benefit of the husband."*

Thus it may be concluded therefore, that *Khula* is a divorce by common consent but the wife has to make the payment of some consideration to the husband because she takes the initiative for dissolution of the marriage such consideration may be in form of waiving the right to receive 'mahr'.

(b) Mubarat

Mubarat is also a divorce by mutual consent of the husband and wife. In *Khula* the wife alone is desirous of separation and makes the offer,

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[6] Holy Quran; Sura II, Ayath 229

whereas in *Mubarat* both the parties are equally willing to dissolve the marriage. Therefore, in *mubarat* the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce, by *Mubarat* is the willingness of both the parties to get rid of each other, therefore, it is not very relevant as to who takes the initiative. Another significant point in the *Mubarat* form of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration. Thus consideration may not be an essential feature in '*mubarat*' form of divorce.

Both *Khula* and *Mubarat* are divorces by common consent but in *Mubarat* no consideration passes from the wife to the husband. The divorce byMubaratis very near to the provisions of divorce by mutual agreement under Section 24 of the Special Marriage Act, 1954 or under Section 13-B of the Hindu Marriage Act, 1955 (as amended in 1976). Like *Khula,* the parties must be competent also in the *Mubarat*; their consent must also be a free and voluntary.

2.4 PROPERTY RIGHTS OF MUSLIM WOMEN

Daughters

In inheritance, the daughter's share is equal to one half of the son's keeping with the concept that a woman is worth half a man.

She has, however, and has always had full control over this property. It is legally her to manage, control, and to dispose of, as she wishes in life or death.

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[7] (1861) 8 MIA 379

Though she may receive gifts from those whom she would inherit from, there should be no doubt that the gift is a means of circumventing the inheritance laws of one third of a man's share, since, under Muslim law, the shares of inheritance are very strict.

Daughters have rights of residence in parent's houses, as well as right to maintenance, until they are married. In case of divorce, charge for maintenance reverts to her parental family after the *iddat* period (approximately 3 months). In case she has children capable of supporting her, the charge falls upon them.

Wives

In Islamic law a woman's identity, though inferior in status to a man's is not extinguished in him when she marries.[8] Thus she retains control over her goods and properties. She has a right to the same maintenance he gives to his other wives, if any,[9] and may take action against him in case he discriminates against her.

She has a right to *mehr* according to the terms of the contract agreed to at the time of marriage.[10]

She will inherit from him to the extent of one eighth if there are children or one fourth if there are none. If there is more than one wife, the share may diminish to one sixteenth. In circumstances where there are no shares in the estate as prescribed by law, the wife may inherit a greater amount by will. A Muslim may dispose of one third of his property by will, though not to a sharer in the inheritance.

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[8] See Quran (Soore Bakar, II Para, Rukoo 28, Aiyat 228, and also see Soore Nisa, V Para, Rukoo 6, Aiyat 34).
[9] See Quran, Soore Nisa, IV Para, Rukoo 1, Aiyat 3.
[10] See Quran, Soore Nisa, IV Para, Rukoo 1, Aiyat 4.

Mothers

In case of divorce or widowhood, she is entitled to maintenance from her children. Her property is to be divided according to the rules of Muslim Law. She is entitled to inherit one sixth of her deceased child's estate.

Chapter-3:
Empowerment of Christian Women in Post-Independent India

Chapter-3

EMPOWERMENT OF CHRISTIAN WOMEN IN POST-INDEPENDENT INDIA

3.1 INTRODUCTORY REMARKS

Now I shall discuss the various provisions of personal law relating to Christian women in India. Divorce laws safeguard the interests of a divorced wife. The Indian Divorce Act, 1869 deals with dissolution of a Christian marriage. The Indian Divorce Act, 1869 and the Indian Christian Marriage Act, 1872 thus should be read together treating the Indian Divorce Act, 1869 as a supplement to the Indian Christian Marriage Act, 1872. As both the Acts were considered out-dated, the government referred the matter to the Law Commission. In the 15th Report the Law Commission recommended some changes in these two Acts. The Ministry of Law prepared a formal Bill accordingly but referred the matter again to the Law Commission for eliciting public opinion thereon. The commission obtained public opinion and submitted 22nd Report in 1961 for thorough revision of the existing Acts. Accordingly, a bill entitled the Christian Marriage and Matrimonial Causes Bill was presented in the Parliament in 1962. However, when the parliament dissolved that Bill also lapsed.

3.2 CHRISTIAN MARRIAGE

Indian legislature had modernized many other family laws on marriage and divorce, but has left these Christian laws untouched. It is interesting to note that the legislature intended the Indian Courts to "act

and give relief under the Indian Divorce Act in conformity with "principles and rules" followed by the courts for Divorce and Matrimonial Causes in England (vide s.7). But then, the English Matrimonial Causes Act have since been overhauled quite a number of times. The principles currently followed by the English Courts on the basis of their thoroughly amended laws cannot be fitted in with the aforementioned antiquated statutory laws of India. This sometimes gives rise to awkward situations. In this connection the case of *R. Hemlatha v. R. Salyanandam*[11] may be cited. A Christian Wife prayed for divorce in the district court of Warangal on the ground of the husband's cruelty and desertion. Almost all the modern statutes incorporated these grounds for obtaining divorce. The district court of Warangal also granted divorce on these grounds. The special Bench of the Andhra Pradesh High Court pointed out that these two grounds entitled the wife to obtain a decree for judicial separation only and as such a decree for divorce could not be passed at all. On the other hand, in a similar case *Elveena v. Gopal*[12] a Christian wife obtained a decree on the ground of the husband's adultery and cruelty. The Full Bench at Chandigarh simply confirmed the decree without making any discussion on the point contained in s. 10 of the Indian Divorce Act that the adultery simpliciter by the husband would not entitle a wife a dissolution of marriage, though this (adultery by the wife) is an important weapon in the hand of the husband to get the marriage dissolved.

Under Section 10 of the Indian Divorce Act, 1869 a Christian Wife may present a petition to the District Court or to the High Court

[11] AIR 1979 AP 1.
[12] AIR 1979 P & H 4.

praying that her marriage may be dissolved on the grounds specified therein. According to this section a husband can get his marriage dissolved if he can prove that his wife has, since the solemnization of the marriage, been guilty of adultery. At the same time a wife who wants to get her marriage dissolved should necessarily prove her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman or has been guilty of incestuous adultery, or of bigamy with adultery or of marriage with another woman with adultery or of rape, sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to divorce a *mensa et toto*, or of adultery coupled with desertion, without reasonable excuse for two years or upwards. So it is evident that this section is discriminatory towards women.

In a recent case[13] the Hon'ble Supreme Court accepting the discriminatory nature of the section 10, has observed that:

"As far as the ground of adultery is concerned it is the husband who is in favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. To that extent, undoubtedly it is the wife who is discriminated against."

The Supreme Court further observed that "For the ground of exchange of profession of Christianity by husband, the wife has also to prove that the husband has married another woman. Since, however, the husband can seek dissolution of the marriage only on the ground of adultery, the husband is not at a disadvantage as against his wife

[13] *Anil Kumar Mohsi v. Union of India and another,* (1994) 5 SCC 704 at 707.

because a mere marriage with another man whether after exchanging the profession of religion or not, would give a ground to the husband to seek dissolution of marriage. Thus even as far as this ground is concerned it is the wife who is at a disadvantage."

It is very unfortunate that in our Modern society equality to women is far from reality while the "cruelty" is also a ground of divorce in various personal laws and enactments it has not been made available to Christian spouses. It is wonderful that inspite of slogans of emancipation and amelioration of women by our leaders "Cruelty" as a ground for divorce has not been included in the Act.

Section 18 of the Act enables a Christian wife to get her marriage declared as null and void for the reasons contained in Section 19 such as the impotency of the husband at the time of marriage and at the time of institution of the suit, the prohibited degree of consanguinity or affinity of the parties etc. More over under Section 22 of the Indian Divorce Act, the wife is entitled to obtain a decree of judicial separation from her husband on the ground of adultery or cruelty or desertion without reasonable excuse for two years or upwards. If the husband has without reasonable excuse withdrawn from the society of the wife, the latter may, under Sec.32 of the Act, apply for the restitution of conjugal rights. Sec. 57 of the Act provides for the remarriage of a person whose marriage has been lawfully dissolved.

As per the provisions in Sections 36 and 37 of the Indian Divorce Act, Christian wife is entitled to claim alimony *pendente lite* during the matrimonial proceedings and permanent alimony after the decree of divorce, from her husband. Remarriage of the wife or conversion to

another religion are prejudicial to the interests of the wife.

According to section 19 of the Indian Christian Marriage Act, 1872, the father if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

It appears unjust in the modern age when the child marriages are discouraged every where. Thus, the child marriage must strictly be prohibited and relevant important provisions must be made in accordance with the provisions of The Child Marriage Restraint Act, 1929.

According to Section 61 of the Indian Christian Marriage Act, 1872, when, in respect to any marriage solemnized under Part VI, the conditions prescribed in section 60 have been fulfilled, the person licensed as aforesaid in whose presence the said declaration has been made shall, on the application of either of the parties to such marriage, and, on the payment of a fee of four anna, grant a certificate for the marriage.

The words "fee of four anna" appears to be obsolete and inadequate, and therefore, may be substituted by "proper fee reasonably fixed by the state government".

An important aspect to be considered while dealing with the legal status of Christian women is, no doubt, the succession laws applicable to Indian Christians. The Christians in India are governed by the

Indian succession Act, 1925 with regard to the matters of intestate and testamentary succession. But the Travancore Christian Succession Act and the Cochin.

Christian Succession Act, being the law for the time being in force, in the respective localities is saved by Section 29 (Z) of the Indian Succession Act. Therefore, in the matter of intestate succession the Christians of Travancore and Cochin are governed by their own succession laws.

As per Sections 15 and 16 of the Indian Succession Act, 1925, by marriage a woman acquires the domicile of her husband if she had not the same domicile before and a wife's domicile during marriage follows the domicile of her husband. In Sec. 20 it is clearly stated that no person shall by marriage, acquire any interest in the property of the person whom he or she marries or becomes incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

The provisions regarding the rights of a widow to inherit the property of her intestate husband is contained in Sec. 33 of the Indian Succession Act. As per the relevant section, if the intestate had left the widow and lineal descendants, V_3 of his property shall belong to his widow and the remaining $^2/_3$ shall go to his lineal descendants. If the intestate has left his widow and has no lineal descendants but has left persons who are of kindred to his, $^1/_2$ of his property shall belong to his widow and the other half to his kindred. If he has left none but his widow, the whole property shall belong to his widow.

Under the Indian Succession Act, 1925 there is no discrimination

between sons and daughters with regard to the distribution of the intestate father's property. The intestate's property (after deducting the Widow's share) is shared equally among his children. In case the intestate has no lineal descendants and if father is dead, his mother and sisters also are entitled to inherit his property as per Section 44 of the Act.

In the area of Travancore State, the Travancore Succession Act, 1916 governs the majority of the Christians in the state but this law is not applicable to the Christians in Neyyathinkara who follow the Marumakkathayam law. The Act is also not applicable in it's entirely to certain Latin Catholic Christians and protestant Christians living in Trivandrum and Quilon Districts. Similarly, the Cochine Christian Succession Act, 1921 is applicable to the Christians in the former Cochin State except in the case of the Tamil Christians in Chittoor who follow the Hindu Law and the Anglo-Indian and the Parrangi Communities. In other parts of the state of Kerala, the Indian Succession Act, 1925 is made applicable.

In fact, there is no substantial difference between the provisions of the Travancore and Cochin succession Acts. In both these enactments the status of women is inferior to that of men. There is evident and unjustifiable discrimination against women. This feature has in effect, degraded these enactments as the most out-dated pieces of legislation which needs thorough and drastic change. Mere modification is not sufficient but a fundamental change is called for.

Now the question for consideration is the rights of women as per these enactments. First, let us take the case of a widow. The Travancore Act

recognizes the widow as one of the heirs of her husband with a share equal to that of a son if there is a son or the lineal descendants of a son left by intestate, and equal to that of a daughter, when there are only daughters (Section 16). She gets $^1/_2$ of the estate when there are no lineal descendants of the intestate, who leaves only his father, mother, paternal grandfather or the lineal descendants of his father or paternal grand father (Section I 7).

If there are none of these kindred left by the intestate, the widow gets whole of the estate (Section 18). The widow's rights in the estate of her husband obtained under Sections 16and 17 (not under Section 18) is only a life interest, terminable by death or remarriage (Section 24).

In the absence of father or lineal descendants the mother of the intestate is also entitled to a share equal to that of a brother.

The most controversial feature of the Travancore and Cochin Christian Succession Acts relates to the right of daughter to the property of her intestate parents. Under Section 28 of the Travancore Act, the sons and their lineal descendants shall be entitled to have the whole of the intestate's property subject to the claim of the daughter for "Streedhanam" fixed at one fourth of the value of the share of a son or Rs. 5000 whichever is less. Any Streedhanam promised but not paid shall be a charge upon the intestate property. Section 5 of the Tiavancore Christian Succession Act defines "Streedhanam" thus : "Streedhanam means and includes any money or ornaments, or, in lieu of money or ornaments any property, movable or immovable, given or promised to be given to a female or, on her behalf, or her husband or to his parent or guardian by her father or mother, or, after the death of

either or both of them by anyone who claims under such father or mother, in satisfaction or her claim against the estate of the father or mother". According to Section 3 of the Cochin Christian Succession Act *Streedhanam* means any property given to a woman, or in trust for her to her husband, his parent, or guardian, in connection with her marriage, and in fulfillment of the term of a marriage treaty in that behalf. So the definition of *Streedhanam* as contained in these Acts, take it outside the ambit of the Prohibition of Dowry Act, according to which it is any property or valuable security given or agreed to be given at or before or any time after the marriage in connection with the marriage of the said parties (Section-2). This was clearly laid down in Kerala High Court's decision.[14]

The Cochin Act gives the daughter a share along with the sons, subject to the limitation that her share shall be one-third in value of that of a son [Section-20(b)]. Anyway it is high time for the Christians of Travancore and Cochin to see that immediate and necessary legislations are undertaken to provide equal shares to daughters along with sons in the property of their intestate parents.

Christian Law of India, in its various aspects has become too outdated and irrelevant to meet the needs of the present century. This is a branch of law which deserves more systematic and critical study and research. Infact it is for the Indian Christians to take the initiative to make a move in this direction and to see that their personal law is amended in such a way as to meet the needs of the present day.[15]

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[14] 1980 KLT 353.

[15] See also article on "Legal Status of Christian Women in India" published in AIR February, 1996 (Journal Section) pp. 33-39.

Chapter-4: Empowerment of Parsi Women in Post-Independent India

Chapter-4

EMPOWERMENT OF PARSI WOMEN IN POST-INDEPENDENT INDIA

4.1 INTRODUCTORY REMARKS

Parsi women are discriminated against by laws which have no basis in the community's religious beliefs. It has been seen how the ownership and inheritance rights of Hindu and Muslim women are affected by their respective laws. The Parsis, a community with 90% literacy, a strong hold on the industrial and professional life of the country although they are one of its smallest minority communities, have among the most unjust inheritance laws in the country today. Which, finally only goes to prove the discrimination and gender biases do not disappear with "progressive education"?[16]

Like Hindu and unlike Muslim law, there are separate rules for the distribution of the assets of a male and a female. The son's share of the father's property is twice that of a daughter: the widow gets only as much as any of her sons.

If the intestate's parents survive him, then the father gets half the share of the son—that is the same as the daughter. But the mother gets only half the share of the daughter. The Parsi mother is in a worse position than the Hindu mother who under the 1956 Hindu Succession Act gets a share equal to that of the widow and the children.

When a Parsi woman dies intestate, leaving her husband and children,

[16] "The Law and Indian Women": A study by the YWCA of India, Printed by Madhulika's, p. 34.

the property is divided equally among the widower and children. Thus, while the son is entitled to an equal share of the mother's property along with the daughter, the daughter is not entitled to the same right when she inherits the property of her father. Mothers and daughters then are the worst sufferers in this community.

4.2 PARSI MARRIAGE

A Parsi woman is afforded no protection against arbitrary decision either-for where as in Muslim law a father cannot disinherit his wife or daughter-he can only will away one eighth of his property according to his wishes—a Parsi male is not bound by any such restriction.

Women are discriminated against even in the final application of such unsatisfactory laws. Parsi law in India applies to three categories of Zoroastrians—persons de-seconded from the original Persian emigrants, born of Zoroastrian parents; children of Parsi fathers by non-Parsi. Women who have been admitted to the Zoroastrian religion; and finally Zoroastrians from Iran, permanently or temporarily residing in India.

Children of Parsi women married to non-Parsis have no rights, as under Parsi law they are not considered Parsi. There is no satisfying explanation for such gross bias.

Priests, Scholars and lay people, all that they can offer are unscientific conjectures about the superior hereditary genes of the male and the like.

The Bombay High Court in 1909 in the case of *"Sir Dinshaw M. Petit*

v. Sir Jamesetji Jijibhai[17] held that the right of a non Parsi woman was to adopt the faith of her Parsi husband—it was assumed that a woman would have to accept the religious faith of her husband. In other words a Parsi woman who marries a non-Parsi would have to follow her husband's faith and bring up her children according to his wishes. The definition itself was arrived at with little debate, by an order of court. At the root of such discrimination itself lies the Parsi's fear of losing their distinctive ethnic identity. For their's is a race which has survived in this country since the seventh century and whose religion was established 1300 years before Christianity. At present, however, they ran the risk of extinction.

Parsi personal law is also based on Hindu custom and the rules of English common law. The first Parsi migrants were allowed to stay in the kingdom of Jadi Rano on the west coast of India on the strict condition that they would adopt the language and some of customs of the State and that they would not convert this people to their faith.

Being so ancient, there is little documentation of legal system governing the Parsis when they first landed in India. But they took on Hindu customs and institutions like the panchayat for administration of their affairs. Priests had the final say in all religious matters.

With the colonization of the country by the British, the Supreme Court of Judicature said in 1773 that Muslims should be governed by Muslim law, Hindus by the *Shastras* and smaller communities like the Parsis should be governed by English civil law, as it was assumed that the latter's laws had no religious identity.

[17] 11 Bom. LR 85 at 128.

This, however, applied only to the three Presidency towns of Bombay, Calcutta and Madras. Elsewhere the Diwani Adalats established by Warren Hastings in 1772 as the highest civil courts of the .districts, continued to apply the personal laws of every community in matters of inheritance, marriage and religion on the basis of "Justice and equity". This sort of quality raised the expected problems, and women suffered in both town and country. In the presidency towns the English statute of distribution meant that Parsi widows got just one third of the estate and the residue was divided equally among the children and their descendents. The English common law rates prevailing at the time meant the married women had no right to hold or dispose of any property during overture.

The mofussil Parsis, following Hindu custom, excluded Parsi women from a share in the estate of the male. They were given only rights to maintenance and adoption. This state of affairs continued till a prospecute male heir challenged the testamentary powers of property disposal by a Parsi father, which according to the English statute of Mortmain allowed the latter, if he so desired, to donate his entire property to charity.

Finally, in 1955 after much discussion, a Parsi Law Association was created to make a thorough study of Parsi custom and put forward legislative proposals. Two statutes were enacted in 1965 namely The Parsi Marriage and Divorce Act and the Parsi Intestate Succession Act, 1936. The succession Act was re-enacted in Chapter III, Part V, of the Indian Succession Act, 1925, and finally, modified by and Amendment Act in 1939.

There were not women on any of the panel which made the legislative

recommendations. In fact, the final statutes were enacted by a Parsi Law Commission headed by an English judge of the Bombay High Court.

Whereas in 1939 these rules conferred better rights to women than existing Hindu and Muslim law, with the passage of time they have gone out of step with progressive social trends.

Why an educated, outwardly emancipated Parsi woman tolerate such inequity is hard to comprehend? Many of course were ignorant of the law until it actually applied to them. In the smaller towns of Gujarat, for instance, even today there have been recorded instances of Parsi women being deprived of their legitimate share in the estate of their fathers and husbands. They have accepted all simply because they are ignorant of the fact that the laws have changed now.

Parsi women also share the fear of extinction of community and most of them have resisted changes in their personal law. Those who have not too preoccupied with the trauma of "expulsion" from the community which is the fate of all those women who marry people of other religious denominations—to organize protest.

But the first time they did and they were successful. This was in 1981, when practising Zoroastrian women married to non-Parsis were denied the right vote in their community's local elections unless they submitted a written affidavit stating that they "practised"' the Parsi faith. They appealed to the court to prevent such humiliation. As more Parsi women join the mainstream of dissent and protest and it is expected that they will find the support needed to stir their community from its present stagnancy.

Part- IV:

SELECTED ACTS EMPOWERING WOMEN IN POST-INDEPENDENT INDIA: CRITICAL ANALYSIS

SELECTED ACTS EMPOWERING WOMEN IN POST-INDEPENDENT INDIA: CRITICAL ANALYSIS

1.1 THE SPECIAL MARRIAGE ACT, 1954

The Special Marriage Act, provides for a civil marriage without any religious significance.

According to Section 4 of the Act, two persons of any religious persuasion, provided they are not within the degrees of prohibited relationship or are not married to any other person under any other religious ceremony, and have both reached the age of majority may be married under the Act.

According to Sec. 5 of the Special Marriage Act, for a marriage to be solemnized, the parties must give notice in writing to the Marriage Officer of the District in which atleast one of the parties has been living for not less than thirty days. This notice is displayed in some prominent place in the Marriage Registry Office. The marriage is to be performed and registered not before thirty days, but within three months of this. The marriage is registered by the Marriage Officer in the presence of three witnesses, and recorded. A certificate of marriage is then issued to the couple.

Section 7 of the Act provides that any person may object to the marriage being performed during the thirty days period of notification on grounds that the marriage would be illegal on grounds covered by the Act, and only upon receipt and verification of such objection the

Marriage Officer may refuse to perform the marriage. In verifying this objection, the officer has full powers, equivalent to a court, to demand evidence and witnesses and make suitable enquiries.

In addition to all other grounds for separation or divorce, mutual consent is accepted as valid. In case the spouses are living apart for a period of one year, a joint petition may be filed. After six months they have to again make the same petition and then the divorce is final. The six months period is to give them the time to change their minds.

In case a marriage between a member of Hindu Joint Family and non-Hindu occurs, the first party ceases to be member of the said joint family. Where both parties to the marriage solemnized under this Act, are Hindus they shall continue to be members of their respective Hindu Joint Families. This was added by 1976 Amendment to the Act. It is a non-secular and a step backward from the uniformity which had been achieved by those marrying under this Act.

Under the Act as now amended (Section 10(1)) the grounds on which a decree for judicial separation may be passed are identical to that required in respect of a decree for divorce. It may be noticed that cruelty and desertion which were not PER-SE grounds for divorce under this section are now made grounds for divorce.

1.2 THE MARRIAGE LAWS (AMENDMENT) ACT, 1976

This Amendment Act has been passed with a view[1] to make further improvements upon the provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

[1] Find the reasons for the Amendment in the speech of the Minister of State for Law, Dr. V.A. Sayid Mohd. "The Pioneer" dated 25.5.1976.

Chapter II of the Amendment Act contains amendments to the Hindu Marriage Act, 1955. And on a cursory look to it, one can find that several provisions[2] of Hindu Marriage Act, 1955 have been completely mauled with further amendments. The new law possesses a very progressive and dynamic character and it is hoped that it will bring much needed relief to the Hindus in matters of marriage and divorce. The amendment, it is observed, is bound to make the divorce among the Hindu community not only quick and easy, but expeditious too.[3] It has the effect of making up to date the marriage and divorce laws of the Hindus to a great extent and bringing it at par with the other community. The following are the changes introduced in the Hindu Marriage Act, 1955 by the Marriage Laws (Amendment) Act, 1976, viz:

(1) All grounds available for a judicial separation have now been made available to a Hindu for divorce too.[4] A Hindu can claim a decree of divorce on the grounds of either desertion[5] or cruelty[6] now.

The meaning of "desertion" has been statutorily widened so as to include "willful neglect" in its definition.[7] Thus an uncared for or a neglected wife can claim a decree of divorce on the ground of her husband's desertion.

(2) A single or isolated act of adultery of infidelity has also been

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[2] Sections 5 clause (ii), 9 to 16, 19 to 23, 25 and 28 of the Hindu Marriage Act, 1955 have been amended in 1976

[3] See sections 13, 14, 19 and 21B of the Amendment Act.

[4] See section 10 and section 13 sub-section (1) sub-clauses (i), (ia), (ib), (ii) and (iii), (iv) and (v) sub section (i) cl. (iii) Expl of sec. 13 fully elaborated the term "unsoundness of mind".

[5] Section 13 sub-sec (1) cl. (ib)

[6] Section 13 sub-sec. (1) cl.(ia)

[7] Section 13 sub-section (1) cl. (vii) explanation

made a ground for divorce now[8] and the old concept of "is living in adultery" has lost that significance, which it once possessed. One lapse in virtue is sufficient now to call for divorce.

(3) Now divorce can also be granted to wife, who is successful in obtaining an order of maintenance under any other law, under the altered Act.[9] This clause obviously benefits the women folk substantially.

(4) A provisions for "Divorce by mutual consent" too find a decent place in the Act.[10] This is a new provision and needs cautious study. For obtaining a divorce on this ground, the parties are required to wait for only six months after filing the petition, though they are obliged to obtain it within 18 months.

(5) In relation to a petition for nullity of marriage, recurring attacks of insanity and epilepsy or mental disorders of a nature rendering a party unfit for marriage or procreation of children, too have been made a ground for nullifying a marriage[11] and further, if these ailments occur later on, these will be an instant ground for divorce[12] too. "A misrepresentation regarding any material fact or circumstance concerning the respondent"[13] is thus a new ground for nullifying a marriage. Thus, the Amendment has thus widened the meaning, scope and the purpose of the term "unsoundness of mind" or insanity.

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[8] Sec. 13 sub-sec (i) cl. (i)
[9] Sec. 13 Sub-sec. (2) cl. (iii)
[10] Sec. 13B.
[11] Sec. 5 cl. (ii) widens the definition of the term "Insanity".
[12] The words "for a period of not less than 3 years ….. "have been deleted in Sec. 13 sub-sec (1) cls. (iv) and (v)
[13] Sec. 12 cl. (c) – (The term "fraud" has been specified)

(6) A minor girl is now entitled to repudiate her marriage; provided she does this after attaining the age of fifteen years, but before attaining the age of eighteen years.[14] This provision possesses close resemblance with the concept of *option of puberty* of the Muslim law.

(7) The Act confers jurisdiction to the court of the area where the petitioner resides, to deal with a matrimonial petition, in cases where the respondent either resides outside India or is not heard of for seven years.[15]

(8) With a view to expedite the disposal of a matrimonial petition a provision has been made in the Amendment Act that the trial should conclude within a period of six months and the appeal within three months.[16]

(9) Now, divorcee can remarry immediately.[17] The waiting period of one year, as was provided in section 15 is now taken away by the amendment.

(10) The interim period between judicial separation and divorce has been reduced to one year[18] (instead of two years) now and appeals from interim orders stand abolished.[19]

(11) Under the Amendment Act, 1976, a spouse can file a petition for divorce after one year of his or her marriage now.[20] Formerly, it was three years. This provision has the obvious merit of

[14] Sec. 13 sub-sec (2) cl. (iv)
[15] Sec. 19 cl. (iv)
[16] Sec. 21B cls. (2) and (3)
[17] Sec. 15 (one year bar is taken away)
[18] See section 13 sub-sec. (iA) (For the words 'two years', "one year" has been substituted)
[19] Section 28 clause (2)
[20] See Section 14(the words "three years" has been replaced by "one year")

reducing the hardships of those couples, who fail to pull on their matrimonial happiness too long. The torturous marital sorrows and displeasures can be cut off or mitigated in a shorter span of time under the altered law.

(12) An explanation has been added to Section 9 of the Act now, the effect of which is to fix the responsibility[21] of proving "reasonable excuse" for withdrawal from society on that spouse, who withdraws from it.

(13) A new shape has been given to Section 16 of the Act. It states as follows :

(i) *"Notwithstanding that a marriage is null and void under Section 11, any child of such marriage, who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."*

Provisions regarding children of a voidable marriage have also been made in the Act on Similar lines.

(14) The Act further provides that every matrimonial proceeding should be conducted in Camera from now onwards.[22]

(15) Section 19 of the Act too gets an elaborate look and its scope appears to be widened. It provides that a matrimonial petition can be presented to the District Court within the local limits of whose original jurisdiction-

[21] Section 9 sub-sec (1) Explanation
[22] Section 22 cl. (i)

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition resides, or

(iii) the parties to the marriage last resided together, or

(iv) the petitioner is residing at the time of the presentation of the petition, in those cases where the respondent was residing outside the territories to which the Act extends or has not been heard of as being alive for a period of 7 years or more by those persons who would naturally have heard of him, if he was alive.

(16) Sections 21 A, 21B and 21C have been newly added to Sec. 21 of the Act, which regulate the transfer and disposal of matrimonial petitions, when presented in different courts by the parties to a marriage. That court has been conferred the jurisdiction to deal with the case, to which the petition was made at an earlier date by either spouse.[23] These sections also make it incumbent on the court to decide the case within six months and in case of appeal, within three months.

(17) In cases, where a move for re-conciliation is made, the court at the instance of the parties or on Jiis own grant adjournment for a reasonable period, but which does not exceed for more than 15 days. This matter of reconciliation can also be referred to a third person. But this discretion has to be exercised by the court in just and proper cases.[24]

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[23] See sec. 21-A
[24] Section 23 sub-sec (3)

(18) Section 23A is also a new section which allows a respondent to make a counter-claim for *a* decree of judicial separation or divorce, in all those cases, in which he or she can prove the petitioner's fault in relation to adultery, cruelty or desertion.

The Amendment Act, 1976 is a progressive piece of legislation which inducts a new sense of self-respect and confidence in the hearts of the Hindu females. It is revolutionary in character and is bound to confer substantial benefits on the Hindu community in marriage and divorce matters in course of time, inspite of its few drawbacks.[25]

Drawbacks of the Amendment Act, 1976

1. Amendment Act, 1976 does not provide for the compulsory registration of marriage yet.[26]

2. The matters relating to the custody and protection of the children stand neglected at present.

3. It is said that the doctrine of "collusion and connivance" still finds a respectable place in a statute, which claims to be founded upon "breakdown or Empty shell" theory of divorce or "No fault" doctrine. The maxim that, "He who comes in equity must come with clean hands" which is incorporated in Section 23 of the Act is left undisturbed, when it deserved moderation or deletion. This is a view which needs further study.

4. The Amendment Act, 1976 does not provide any kind of

[25] See the views in the following articles, viz. Sujata Manohar's "Making Divorce Easy" published in "the Illustrated Weekly of India" of 23.5.76; Ram Sahai Pande's "Naya Vivah Kanoon" (Hindi) published in Dharmayuga (Hindi) of July 17th, 1976.

[26] Compulsory Registration was one of the important recommendations of the committee on the status of women. this matter has been left to States at present.

economic stability to a divorced wife, if she happens to be an illiterate or unemployed or unprovided for.

5. The age of marriage has not been increased by the Amendment Act, when the national policy required it the most, though there is a likelihood of it being increased in the near future.

But whatever may be its lacunae, no one can deny the vast merit and utility of it.[27]

1.3 THE DOWRY PROHIBITION ACT, 1961

Under this Act', both the giving and receiving of dowry is prohibited. Dowry has been defined as any valuable asset, property or gift that is given or received by either party of the marriage, or the parents of either party of the marriage, to either each other or to any other person, in connection with or consideration of the marriage. These assets or gifts may have been given before, at or after the marriage,[28] but they must be in connection with it, to qualify as dowry. The exceptions to this is the dower or *Mehr* that is the right of Muslim Women, under Shariat law are also accepted as presents made to either the bride or the groom, provided that lists of such presents are maintained and the gift remains the exclusive property of the receiver, and provided that the value of the gift is not excessive considering the financial status of the giver. Such gifts must also be voluntary.

Any person either giving or receiving dowry, or abetting the giving or receipt of it is punishable under the Act. Offence under this Act is

[27] Find a statement of Dr. V.A. Sayid Mohd Minister of State for Law in this regard "The Government would not hesitate to come forward with further liberalization, if it was found necessary" published in "The Pioneer" dated 25.5.76.
[28] *State of HP v. Nikku Ram,* (1995) 6 SCC 219-B at (223 to 224).

punishable with imprisonment for 5 years, and a fine of Rs.15,000 or the amount of the value of the dowry, whichever is more. The court must impose sentences of both imprisonment and of fine, upon conviction of the accused.

Any demand or request for dowry from one party to the other or to the relatives of the second party in the marriage, is similarly punishable with imprisonment of between six months to two years and a fine of upto ten thousand rupees.

In either of the above instances, however, the Court may impose a lesser term of imprisonment than statutory, in case the Court considers it advisable. According to Dowry Prohibition Act, both the giver and taker of the dowry are punishable. As a result, complaints for dowry extortion are not being lodged. Hence the persons giving dowry should be excluded from liability.

All and any contractual agreements, transactions of property and agreements in respect of dowry are void in law. That is they have no legal validity.

The legitimate owner of any assets of property given to her as dowry or given in connection with her marriage is the woman. In the event that such assets have been received by any other person, they are to be handed over to the woman within three months of receipt or of the marriage or of the attainment of majority of the woman, in case she received the dowry as a minor. In case this is not done, a complaint must be made within one year from the date of expiry of the three months. The penalty for contravening this law is minimum term of six months imprisonment, upto two years, or a fine upto ten thousand

rupees or both. The Court has no discretion to award a prison term of less than six months.

In case a woman dies before receiving back her dowry, her legal heirs, according to the appropriate personal law, are entitled to claim it from the holders of the dowry.

Even though dowry received or given before this Act is not covered by the Act, complaints in respect of retrieving such dowry are covered by the legislation.

The Dowry Prohibition Amendment Act, 1986 has placed a ban on advertisement by any person, of any share in his property or of any money as considerations for the marriage of his son or daughter or any other relative. Such offence is punishable with imprisonment for a term of minimum 6 months which can be extended to 5 years or with fine which may extend to Rs. 15,000.

It is also to note that the anticipatory bail should not be granted in such cases. According to Geeta Luthra & Pinky Anand:

> *"It is in this context that anticipatory bail plays a significant role. Crime against women is not only limited to the individual, but is also a crime against society unless there are strong compelling reasons. If bail in anticipation of arrest is granted to an accused the entire purpose of bringing criminals to book is lost.*
>
> *Once anticipatory bail is given, it is not unusual for the case to drag on for several years, and force the victim to accept defeat because she has run out of energy or resources to continue the battle. Thus, we believe, that no anticipatory bail ought to be granted until all the dowry items are returned".*[29]

[29] See an article of Geeta Luthra and Pinky Anand on "Scrap anticipatory bail in Dowry related

Offences under this Act are non cognizable and non-bailable. It is worth mentioning that a Court may take cognizance of offences under this Act upon either its own knowledge, upon a police report or upon a complaint to the magistrate or judge either orally or in writing. Reports with the police or complaints to the judicial authority may be made by the person aggrieved by the offence, the parents of this person, or any recognized welfare institution or social organization. It has also been recognized that in consequence or connection with dowry demands, many women are harassed, brutalized, murdered or induced to commit suicide. Under this Act in the event of death of the woman within seven years of marriage due to unnatural causes, it is now necessary for the husband and his family to prove that the death has not occurred as a consequence of dowry demands. If they are not able to prove their innocence they are liable to punishment under the law as for murder. Indian Evidence Act has also been changed accordingly by insertion of new Section 114-A. In such circumstances all properties of the woman shall:

(a) If she has no children, be transferred to her parents. J (b) If she has children, be transferred to such children and pending .... such transfer be held in trust for such children.

However, despite these provisions, the onus is always upon the complainants in the case of an alleged dowry death to prove the guilt of the husband.[30] Circumstantial evidence, the mental state of the women before her death, her obviously and necessarily deteriorating relationship with her husband and his family are frequently used to

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cases" published in "The Pioneer (Lko)" dated 11.2.92.

[30] See also Nasir Atteeq: 'Dowry Laws' published in " The Pioneer (Lko), dated 9.4.1996, p. 10.

prove suicide.

1.4 MATERNITY BENEFIT ACT, 1961

The Constitution of India guarantees to women equal opportunities in employment, equal wages for equal work and special consideration on the basis of gender, where legislated. This approach has led to the formulation of several laws to protect the employment remuneration and terms of employment of women.

Under Maternity Benefit Act, 1961, certain benefits accrue to women provided they have been working in an organization for not less than 160 days in the year immediately before their expected date of delivery.

1. Six weeks paid leave at the time of delivery.

2. One month prior to delivery their work may be lightened upon request, in case they are engaged in physically strenuous work.

3. Every woman is entitled to Maternity benefit and is entitled to receive from the employer a Medical bonus of Rs.25 if no prenatal confinement and post-natal care is provided for by the employer free of charge

4. Nursing Breaks : Every women delivered of a child who returns to duty after such delivery shall in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of 15 months. The "prescribed duration" varies from state to state. For instance Sec. 6 of the Delhi

Maternity Benefit Rules, 1971, provides Nursing Breaks for a period of 15 minutes plus the time taken to reach the place where the child is left. The travel time cannot be less than 5 minutes and more than 15 minutes.

No employer is permitted to discriminate against a woman in case she incapacitated during pregnancy. Her continued employment is protected.

1.5 EQUAL REMUNERATION ACT, 1976

Essentially, the Equal Remuneration Act, 1976 provides that:

1. In work of equal value, skill and effort, women are paid as much as men.

2. In opportunity for employment or promotion, women may not be discriminated against on grounds of gender except where the employment of women in such work is prohibited or restricted' by or under any law for the time being in force. Contravention of these laws is a punishable offence.

The Equal Remuneration Amendment Act, 1987 provides for no discrimination in any condition of service subsequent to recruitment such as promotions, training or transfer. In addition under various Acts such as Plantation Workers Act, Construction Workers Act, Factories Act, provision has been made for women to have separate rest rooms and toilet facilities.

Recognizing that child care is almost invariably the women's province, all establishments employing more than 20 women in a

non-powered industry or ten women in a powered industry are compelled to provide child care facilities i.e. creches.

1.6 FAMILY COURTS ACT, 1984

Every dispute between a man and a woman, relating either to marriage or the obligation of marriage or to their offspring has been brought under the purview of Family Courts. This court has status equivalent to a District or subordinate Court[31] and is itself directly subordinate to the appropriate High Court. All cases and disputes relating to issues of marriage or offspring or marital disputes regarding property or assets or maintenance, will automatically be subject to arbitration of Family Courts as soon as one is established in an area. All such disputes that are under any other court in the area will immediately be transferred to the Family Court as soon as it is established in the area.

The judges for these courts are to be those who have at least seven years experience as advocates or as judges[32] and will preferably be woman. In selecting persons for the appointment of judges every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation or counselling, are selected.[33]

No lawyers are permitted for either party without the consent of the

[31] Section 7 of Family Courts Act, 1984
[32] Section 4(3) of Family Courts Act, 1984
[33] Section 4(4) of Family Courts Act, 1984

parties if the Court considers it necessary in the interest of justice.[34] The proceedings are held in camera.[35] The court's primary responsibility, in case of marital disputes is to intervene so as to arrive at a settlement other than irretrievable breakdown of the marriage. The courts may adjourn the cases for long periods in the event that a solution of reconciliation is being attempted. The services of medical and counseling experts, preferably a woman, where available, may be secured by the court where it believes that such services would be of value.[36] The court may collector admit whatever evidence it considers material to the cases and also examine any witnesses.

It is observed that there are several drawbacks in these proceedings. Firstly, the bias is in favour of holding the *status quo* of the marriage. I always the woman is pressurized for adjusting or submitting particularly as in most cases she is less educated, less articulate and less assertive. The entire weight of her conditioning and of social values already makes it difficult for her to contemplate the dissolution of a marriage. This bias of the courts then, only serves to reinforce the position of powerlessness of the women.

The long adjournments permitted in order to affect reconciliation also generally tend to make difficulties for the woman whose status is then in suspense and leaves her vulnerable to all kinds of harassment and pressures.

Since no legal representatives are permitted and women are less well informed in legal matters concerning their rights and in fact have

[34] Section 13 of Family Courts Act, 1984
[35] Section 11 of Family Courts Act, 1984
[36] Section 12 of Family Courts Act, 1984

number of misconceptions about their lack of rights, it is easy for the man in the dispute to escape responsibilities. The provision for in camera proceedings also acts in a similar manner to deprive the woman of access of social pressure which could ensure equitable treatment to her. Infact, because the proceedings are held in camera the opportunity for such injustices being taken up in a public forum as a socially relevant evil are prevented. It is also then very simple to exclude militant organizations from supporting the cause of the oppressed women. Again, the discretion of a single person, with the inherent prejudices and personal norms that govern the individual's decisions, are the criteria for judgment rather than an established and objective norm.[37]

1.7 THE INDECENT REPRESENTATION OF WOMAN (PROHIBITION) ACT, 1986.

Two images of women, in conformance with patriarchal values and structures, have been propagated and reinforced through the media. One is that of the virtuous, chaste, submissive girl or "lady" the other is her antithesis. The vulgar, "sex-object" that is entirely lacking in dignity and unworthy of human consideration or respect.

The representation of the latter, being easily identifiable with obscenity is more easily condemned by the establishment, and so in 1986, an Act was passed to prevent the use of this image either in itself for purposes of pornography or as a selling gimmick for any kind of products or services.

[37] See also Anjali: 'The pathos of family Courts' published in 'The Pioneer (Lko), dated 9.4.1996, p. 10.

Under this Act, indecent representation of women in any form has been prohibited. Indecent representation means the depiction in any manner of the figure, form, body or part of the body in such a way as to denigrate the image of woman or as is likely to deprave or corrupt public morals.[38] However, no provision has been made to specifically ban material that similarly degrades woman without any explicit representation of her form or body. Sophisticated advertising, techniques permit such representation by insinuation in a far more subtle and damaging manner.

The Indecent Representation of Women (Prohibition) Act, 1986 covers all visual forms of media, books, pamphlets, writing, slides, films or objects but makes exception for any materials having religious significance or which have value as objects or art or in the interest of science.[39] This Act also provides for the use of the figure, form, etc. of a woman where it is necessary as information for the public good. This would presumably include educational material, advertisements for medical remedies where necessary, and similar instances. But the fact is that the Act has been observed in its non-observance.

For a first offence, the penalties may be imprisonment upto two years and a fine of upto Rs. 2000.00. Subsequent offences would merit a fine of above Rs. 10,000 and upto Rs. 1 lakh and with imprisonment of not less than six months but not more than five years.[40]

Any authorized gazetted officer may inspect and search premises

[38] Section 2(c) of Indecent Representation of Women (Prohibition) Act, 1986
[39] Section 4 of Indecent Representation of Women (Prohibition) Act, 1986
[40] Section 6 of Indecent Representation of Women (Prohibition) Act, 1986

suspected of holding such materials at any reasonable hour, except for dwelling place, for which he may require a search warrant. He may also seize any such material and hold it in custody as evidence until directed by a magistrate as to disposal of the material. In case the material seized forms an integral part of any larger advertisement or object, the whole may be seized.[41]

Any person or company associated with the production, use or dissemination of this material is liable for prosecution under the Act. Such offences are cognizable and bailable.[42]

Unfortunately, the responsibility for adjudging the indecency of any material is left entirely to the individual officer who has been authorized in the area. No norms have been laid down except the vague terms used earlier: "indecent representation depiction of the figure, form, body derogatory or denigratory to women....or likely to deprave, corrupt or injure public morals." The interpretation of these descriptions is left entirely to one gazetted officer whose personal morality forms the basis of criteria, rather than a social and legal norm.

1.8 THE COMMISSION OF SATI (PREVENTION) ACT, 1987

Today, the status of women in India can be gauged quite closely from the fact that a practice such as Sati is possible, and publicly supported and glorified.[43]

The new anti *Sati* Act, substitutes the various legislations that have

[41] Section 5 of the Indecent Representation of Women (Prohibition) Act, 1986
[42] Section 8 of the Indecent Representation of Women (Prohibition) Act, 1986
[43] Sakuntala Narasimhan: SATI, A study of Widow Burning in India, Ist Ed. 1990 p. 1. See also an article of "Naina Kapoor" on "No gender perspective even in "progressive" legislation" published in "The Pioneer (Lucknow" dated 21.2.92, p. 1.

been operative in different parts of the country with a central law that seeks, not only to prevent and punish the commission of the Act itself, but also to make an offence any glorification of the act of *Sati.*

There are provisions in the Act to take action against the exploitation of such criminal occurrences either for financial or political purposes. Specifically, the Act makes a criminal offence, equivalent to murder, the abetment or encouragement of a *Sati* or an attempted *Sati.* Such action is liable to sentence of death or life imprisonment, with an appropriate fine.

The *Sati* herself is liable to prosecution as suicide, the penalty being a year's imprisonment with fine. The glorification of *Sati* is defined as the observation of any ceremonies or the taking out of processions in connection with the incidence or practice of *Sati;* the support, justification or propagation of the practice; or the arrangement of or participation of any function to eulogize a person committing *Sati;* the creation of a trust or fund or collection of donations for the purpose of a temple or any other structure with a view to perpetuate or honour the memory of a person committing *Sati;* or the performance of any ceremony for the same purpose.

Under the Act, all temples dedicated to such practice or persons are to be removed.

The penalty for glorification of *Sati* is imprisonment from 1 to 7 years, a fine of Rs. 5,000 to Rs. 30,000 and the confiscation of all assets collected in the name of *Sati.*

Special Courts are to be convened for the trial of offences under this

Act, equivalent to sessions courts, with judges of equivalent powers.

All such cases are to be tried without delay, there being required reasons to be furnished if trials are adjourned beyond the next day.

The onus of proof of innocence rests with the accused.

No person who had abetted the commission of *Sati* may inherit the estate, either whole or even in part, of the deceased woman.

The Act unfortunately does not take into consideration two important facts:

- The first is that the widow is a victim of her social environment and pressures, treating her instead as a criminal.
- The second is that funds for the glorification of Sati are often donated not by individuals but by corporate entities for publicity purposes or tax evasions.

The institutions of Devdasi in its monstrous form could still be seen in the State of Andhra Pradesh, Karnataka and Maharashtra whereas in Orissa, the State administration is struggling to keep the practice alive despite stiff opposition from women activists. In this tradition, the girls are dedicated to temples at a very young age. She lives under the control of the priest & in the name of religion priest & other it is alleged sexually abuse and exploit them. Even in the present century this social evil has ruined the lives of many girls amidst the government apathy to wipe it out. It is a case of a passive condonation of sexual abuse & harassment of young girls by the government and the social agencies, who boast on making efforts for the upliftment of

the women folk. The first annual report of the National Commission for Women paints a rosy picture saying that the devdasis are "revolting" against the system.[44]

1.9 THE NATIONAL COMMISSION FOR WOMEN ACT, 1990

In 1990, the National Commission for Women Act has been passed. Under Section 3(1) of the Act, the Central Government shall constitute a body to be known as the National Commission for Women to exercise the powers conferred on, and to perform the functions assigned to it under this Act. The Commission shall perform all or any of the function mentioned under Section 10 of the Act, such as, investigating and examining all matters relating to the safeguards provided for women under the Constitution and other laws, reviewing the existing provisions of the Constitution and other laws affecting women and recommendation of amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislation, taking the cases of violation of the provisions of the Constitution and other laws relating to women, looking into complaints and taking *suo motu* notice of matters relating to deprivation of women's rights and non-implementation of laws enacted to provide protection to women, and evaluation of the progress of the development of women under the Union and any State etc. General provisions of law with respect to Indian women are as following:

All personal laws accept the basic idea of women having some rights to support in the event of the dissolution of a marriage. These rights

[44] See the article of C. Jayanthi on "The devdasi system" published in 'The Pioneer (Lko)' dated 31.1.1996, p. 10.

are circumscribed by various conditions. In a marriage that is void the wife is not permitted to sue for maintenance. She is entitled to maintenance if a voidable marriage is annulled, or if a valid marriage is dissolved. In the event of a judicial separation, she is also entitled to maintenance.[45]

Where she is entitled to maintenance, the extent she is entitled to claim varies not only according to the limitations imposed by the laws but also the decision of the judges. In Hindu adoption and maintenance Act, 1956, the court has the discretion to fix the amount of maintenance. The amount varies from case to case and is calculated on the basis of the income and liabilities of the parties. The amount of maintenance can be increased or decreased by the court on altered situations. According to Muslim law, she may be given the agreed amount of *mehr* and as for continued support, she is legally entitled to it only during the period of *iddat*. This point was thoroughly considered in *Mohd. Ahmed Khan v. Shah Bano Begum.*[46] It is worth mentioning that the sum settled by way of *mehr* is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal law do not countenance cases in which the wife is unable to maintain herself after the divorce. It is not only incorrect but unjust. Because the Muslim Personal Law, which limits the liability of the husband to provide for the maintenance of the divorced wife during the period of *iddat*, does not contemplate or countenance the situation envisaged by Sec. 125 Cr. P.C., it would be wrong to hold that the Muslim husband,

[45] See an Article of Himanshu J. Trivedi on "Permanent Alimony and Maintenance Under the H.M. Act, 1955" published in AIR 1990 (Nov.) 65.
[46] AIR 1985 SC 945; (1985) 2SCC 556:1985 SCC 9Crim.) 245.

according to his personal law, is not under an obligation to provide maintenance, beyond the period of *iddat*, to his divorced wife who is unable to maintain herself. Infact if the divorced wife is able to maintain herself, the liability of the husband to provide maintenance for her ceases with the expiration of the period of *iddat*, otherwise she is entitled to take recourse to Sec. 125 of the Criminal Procedure Code. Thus, the conclusion is that there is no conflict between the provisions of Sec. 125 and those of the Muslim Personal Law on the question of the Muslim Husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

In 1986, the Muslim women (Protection of Rights on Divorce) Act was passed. The Act has consolidated and harmonized the different schools of the Muslim law in the matter of payment of maintenance to the wife on divorce. While the orthodox view of the husband's liability to pay maintenance only upto *iddat* period finds prominence in this Act, the modern trend as reflected in Section 125 of the Cr. P.C. has also been included making it optional on the choice of both the parties. In Christian law, it has been observed that "the wife is entitled to 25 per cent to 30 per cent of her husband's income calculated on the basis of his earnings in the three years immediately preceding the decree of divorce".[47]

In case maintenance is not paid she has recourse to court for payment of arrears. Refusal to comply with the court order to pay the arrears may be punishable with a fine or with three months imprisonment. It is interesting to note at this point that till date sentence of imprisonment

[47] See "The Law and Indian Women":A Study by the YWCA of India(Printed by Madhulika's),p.20.

has not been passed against any violation of this order. There is no provision for deduction of this payment from source of income. Nor is there any fool proof method of determining the husband's income unless he is a salaried person. In this case his income from salary is determinable and it is on this basis that maintenance is fixed.

A woman may also sue for support under Section 125 of Criminal Procedure Code. Section 125 is a summary and expeditious procedure to get maintenance and is applicable to all Indian women irrespective of religion, caste, creed etc. Pleading destitution, and inability to maintain herself, she is granted relief on grounds of ensuring her virtue and saving her from immoral means of earning for her living.

The maximum amount that may be claimed under this is Rs. 500 per month regardless of the actual income of her husband. If it can be proved that the woman is "unchaste" or if she remarries, her claim to maintenance is set aside.

Sec. 125 applies to all Indian women except Muslim Divorced Wives.

The Act which debars Muslim women from benefitting under Sec. 125 of the Criminal Procedure Code is the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Generally, the interest of the child is always seen. Although, in every instance, the father is regarded as the natural guardian of the child, and must be proved unable or incompetent or morally undesirable as an influence on the child for the guardianship to devolve on the mother

In the case of the male child under Muslim Law, the mother is permitted to have the child live with her until he is seven, for the

benefit of the child. In the case of female children, this may be extended to puberty. She does not, however, have the right of guardianship over any properties or assets that the child may own. She must depend on her own earnings or on the payment of child support from the father. In case the father does not pay child support regularly, she may have recourse to court to claim arrears. Here too, there is no remedy for ensuring regular payment of this in the future. In case the mother does not live a "chaste" life she is considered a bad moral influence on the child and even the minimal rights she may be rescind by the courts.

Visiting rights are nearly always granted to the mother in case her children are not in residence with her. If her husband does not comply with her the court order and produce the children to be with her at the times specified in the order, she may have recourse to law and he may be compelled to comply, if necessary under the supervision of the police.

The only inalienable right which a woman has, to property at the time of divorce is to the "*stridhan*" i.e. to the jewellery or other gifts made to her by her in-laws and her parents during the period of marriage and to the dowry she has brought.

If she has a separate bank account or savings or properties either exclusively in her name or in the joint name of herself and her husband, she may lay claim to some portion of these jointly held assets and to the entire assets held by her individually.

She has no claim to the marital home which is assumed to be the husband's, unless otherwise proven. She may, in rare cases be able to

retain right of residence over her husband's, claim if the custody of the children, has been awarded to her or if sufficient grounds can be shown to persuade the courts to compel the husband to leave such as extreme cases of violence towards the wife or the children. However, the court usually assumes that since the wife has come to her husband's house to reside as a married woman with him, once she abandons this role, for whatever cause, however, justified, she will return to her parental home or fend for herself. In most cases, violence causes the woman to flee her marital home for self protection, leaving the man in possession.

For marriage, a woman must, if she is under 18 years

Have the consent of her natural or legal guardian i.e. her father, in his absence, her mother or in their joint absence, whoever has been appointed by them or the State as her guardian. In case she suffers harassment from her natural or legal guardian she may appeal to the State for relief. It is necessary for her in this instance to file a report called a First Information Report with the local Police Station. In case it is possible, she should also consult a lawyer and be represented through the office of any voluntary organization or major persons who are willing to espouse her cause.

If she leaves her parental home, it is essential for her to file a statement with the local police station stating her reasons for leaving, that she has voluntarily taken refuge with such and such a person or organization. The organization or individual concerned must also file a statement with the police informing them that the minor girl has taken refuge with them and of the address where she is accessible. Failure to do this

may result in a case of kidnap being filed against the concerned organization or individual. Minor girls do not have the freedom of sexual choice. In case sexual intercourse occurs, even with the consent of the girl, the man concerned may be convicted of statutory rape. Any persons aiding such a relationship may be found guilty of assisting and abetting the crime. A minor girl may not be compelled to marriage. In case she is being forced into marriage she may have recourse to the court. In the event that the marriage is solemnized, she may appeal for relief either in the form of annulment or of divorce under every personal law.

In case of a child marriage, the girl may file for annulment between the ages of fifteen and eighteen.

Repudiation of such a marriage is recognized under Hindu law. If, however, she willingly engages with her husband in intercourse after attaining her majority, she may not file for annulment.Under Muslim law a minor wife is entitled to dissolution of her marriage if she proves the following facts:

1. The marriage has not been consummated. (The Option of puberty is lost if the marriage is consummated after puberty but not if consummated before puberty).

2. The marriage took place before she attained the age of 15 years.

3. She has repudiated the marriage before attaining the age of 18 years.

Christian Law does not recognize repudiation of such marriages.

If she has attained her majority, a woman may freely marry any man of her choice. Her guardian may not seek to restrain her by coercion of any sort. Any attempt to do so, either by physical restraint or violence or psychological pressure amounting to cruelty or by refusing to hand over guardianship of her assets or property, is illegal. She has a right of residence in her parental home until she marries, and if she belongs to a Hindu joint family she is entitled to have her marriage expense paid by the family. It is also important to discuss here the provisions of Special Marriage Act, 1954.

The Special Marriage Act, 1954 provides for a civil marriage without any religious significance. According to Section 4 of the Act, two persons of any religious persuasions, provided they are not within the degrees of prohibited relationship or are not married to any other persons under any other religious ceremony, and have both reached the age of majority may be married under the Act.

According to Section 5 of the Special Marriage Act, 1954, for a marriage to be solemnized, the parties must give notice in writing in the form specified in the Second Schedule to the Marriage Officer of the District in which atleast one of the parties has been living for not less than 30 days. This notice is displayed in some prominent place in the Marriage Registry Office. The marriage is to be performed and registered within three months but not before thirty days of this. The marriage is registered by the Marriage Officer in the presence of three witnesses, and recorded. A certificate of marriage is then issued to the couple.

Section 7 of the Act provides that any person may object to the

marriage being performed during the 30 days period of notification on grounds that the marriage would be illegal on grounds covered by the Act, and only upon receipt and verification of such objection the Marriage Officer may refuse to perform the marriage. In verifying this objection, the officer has full powers, equivalent to a Civil Court, to demand evidence and witnesses and make suitable enquiries.

It has been observed that the Special Marriage Act in reality is an Indian Marriage Act which applies to all Indian Communities irrespective to caste, creed or religion. The concept of this marriage is monogamous, union is for life or dissoluble only by judicial authority.[48]

A married woman has a right to:

1. Maintenance from her husband according to his status and economic condition, regardless of her income or assets. Failure to provide this is in Hindu and Muslim law sufficient ground for judicial separation or divorce. In Christian law it is ground for separation but for divorce only in conjunction with adultery.

2. Respect for her person and physical well being. She may not be subjected to physical and psychological violence or cruelties, which are grounds for divorce or judicial separation in Hindu and Muslim law but not in Christian law. In the latter, she may obtain a judicial separation but as grounds for divorce, it is necessary that she proves adultery in conjunction with cruelty.

[48] *Abdur Rahim Undre v. Padma Undre*, AIR 1982 Bom. 341: (1982) 2 DMC 204.

3. In case her husband has incurable and communicable leprosy or sexually transmitted diseases she may be granted divorce or separation, though these are not adequate grounds in Christian law. Coercion to intercourse by the husband is rape only if the wife is below 15 years of age and if there is a judicial separation between the husband and wife. Except under these circumstances, the concept of marital rape has not been recognized in India. In case of continued refusal to engage in intercourse or in case she refuses to cohabit with her husband, he may sue for restitution of conjugal rights under any personal law. In case she fails to comply, these are sufficient grounds for divorce. She has reciprocatory rights in demanding cohabitation. However, in case of dispute of place of residence, in nearly all cases, the place of marital residence is considered to be the husband's place of residence.

4. In case she is engaged in sexual intercourse with a man other than her husband, he may file for divorce on grounds of adultery. The other man is liable to be sued for compensation, in Christian law. Besides under Criminal law, a husband can criminally prosecute him and he is liable to punishment.

5. A wife's consent to adoption by her husband is necessary. She herself is permitted to adopt with the consent of her husband. This applies only to Hindu wives, because in the absence of a Uniform law on Adoption, persons of other religious persuasions are not entitled either to adopt or to be adopted.

6. She is accepted as natural guardian to her children, second to her husband.

Offences relating to minor girls

Sections 366-A, 372 and 373 of the Indian Penal Code are significant on this point according to which procuration of a minor girl for purposes of prostitution, selling or letting, to hire a minor girl and buying or obtaining possession of a minor girl for the same purposes are criminal actions conveying a penalty of upto ten years and fine. /

Violence against women

There are many situations of violence against women, covered by different sections of the Criminal Procedure Code. Apart from violence that is not gender specific, such as murder, there are laws that relate to sexual violence inflicted upon women.

The most extreme form of such violence is rape, which is covered under Section 376 of Indian Penal Code. Under this section, if a woman is-compelled to submit to sexual intercourse, without her consent, she may be entitled to redress from the law. In order for such a complaint to be redressed, however, it is necessary for a woman to prove that she was not a willing party to the intercourse, that intercourse did occur. That she did not, by her manner of dress, or in any other way, invite intercourse, that she is a woman of "good character", and that she resisted rape under consideration of fear or because she was aware that resistance is either useless or would incite the rapist to further violence, and was considered to have co-operated. Similarly, it is not possible, under the law for a prostitute to be raped,

since she is not a woman of good character. The fact that she may have, for valid economic considerations, commoditized her sexual activity, appears to abrogate her rights over her own body. The mere fact that the woman did not bear the best of character may at best only render it likely that she might be a consenting party. It would not necessarily follow that she was a consenting party.[49]

In case a rape is proved, the maximum sentence may vary from ten years with a fine, to life imprisonment.

In situations of rape, there are strong social pressures that affect the outcome and infact the process of redress. Nearly always, the woman is intimidated by the stigma of "unchastity", and therefore, does not complain and in fact protect the rapist. Should she summon up enough courage to file a complaint, the bias of the social and legal system, right from the police who make the inquiries to the judge, is against her. The onus is on her to prove the rape, despite the heavy social odds. Very rarely is a conviction carried through.

Statutory rape is the commission of intercourse with a minor woman either with or without her consent, but without the consent of her guardian, and outside marriage. There is no difference in the sentence imposable in case the consent of the minor girl to the intercourse was obtained.

It is possible for a husband to rape his wife if he compels her to engage in sexual intercourse without her consent, only if she is below 15 years of age. It is apparently, less of a crime when a woman is raped by a man she is bound to in marriage.

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[49] AIR 1953 Ajmer 12 (Lalu).

In India, it was not until 1983, that the Criminal Law Amendment Act provided that a husband could be lawfully charged with rape. But this exception to the general immunity is very narrowly defined, i.e. where the husband and wife are living separately by a Court Order and he has sexual intercourse with her without her consent.

Since legal separations are rare in India, this category of culpability is insignificant. Instead, within the home and specifically the marital bed, women continue to be sexually assaulted and violated with no redress whatsoever.[50]

However, now, in Indian Evidence Act, 1872 Section 114-A has been inserted, according to which-

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Panel Code (45 of 1860) where sexual intercourse by the accused is proved and *the* question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Prostitution and trafficking

There is no law that directly criminalizes prostitution. However, soliciting in a public place is illegal. So is the trafficking in women i.e. engaging in the buying and selling of women for the purpose of prostitution. The law against soliciting obviously makes it impossible for the woman to obtain clients legally. Those women who fall into the

[50] See Article of Naima Kapur and Jasjit Purewal: "Rape in marriage, the unpunished Crime" published in "The Pioneer" (Lucknow's daily News Paper) dated 30.12.91, p.7.

lower income brackets obtain clients on the street and public places where they are always being picked up by the police and are vulnerable to all kinds of violence. Usually the sentences are restricted to a fine with a short prison term in addition, for those who have been picked up repeatedly.

There is no law at all against the client, who is definitely an equal participant in the offence. This bias works strongly against the position of the woman. Since the client runs no risk, there is no social motivation to protect the right to livelihood of these women. The women are also then vulnerable to all sorts of pressures from those who traffic in them. The threat of arrest, prison term, police or social violence keeps the woman submissive and under control.

There are laws against trafficking in woman, with fines and penalties of three to ten years imprisonment as a maximum depending upon whether the woman is a minor girl or not. However, it is very difficult to pin the charge on pimps or brothel keepers for several reasons. One is that the woman herself protects them. Also these traffickers have excellent relations with the enforcement personnel and can usually ensure that no charges are preferred against them. Prostitution in India, particularly in the cities and commercial and tourist towns is largely syndicated.

In most cases, the brothel owners or pimps stand in court as the legal guardians of the woman and the women are returned to their custody in the course of law.

It is a debatable point as to whether laws on prostitution, (prohibition or control) should at all exist in the present social situation. Due to the

economic and social structures predominant, it appears to be the only avenue for the survival of many unfortunate women. However, the structure of the current laws permits all the perpetrators, such as the client and the procurator to get off scot free while the women, who are merely exploited for their benefit, carry the brunt of social and legal disapproval and penalties. Sex workers of Calcutta demanded the legalization of their trade on the ground that they can survive with this trade only.[51]

Rights of women when taken into custody

The law provides that a woman may not be arrested or taken into custody without the presence of a police woman. Male police may not attempt to physically restrain or control a woman. If a woman is to be searched, it must be done by a police woman in the presence of atleast one other. Bodily search may not be conducted in the presence of male police officers.

Women prisoners have a right to separate areas for sleeping, washing and toilet facilities. It is not permissible to separate a mother and young child in custody, unless the child is old enough to be independent of care. Women prisoners must be supervised by female wardens.

Upon a charge being made, the accused has a right to read and possess a copy of the complaint. The accused also has a right to legal advice and the services of a lawyer before responding to the complaint in any way. In case the accused does not have the financial resources to hire legal services, the State is compelled to provide the same, free of cost.

[51] See article of Arvind Kala on "Need to Legalize prostitution', published in 'The Pioneer (Lko.)' dated 20.03.1996, p. 10. Prostitution for instance, is legal in Melbourne, Australia.

This provision applies also to persons engaged in civil litigation, being based on the constitutional right to legal representation. When the woman is the complainant:

(a) *In a Civil Suit:* She has the right to free legal aid. In matrimonial disputes and maintenance suits, she has the right to interim relief. She has the right to copies of all statements of the defence.

(b) *In a Criminal Case:* She has the right to free legal aid. She has the right to a receipt of copy of her complaint known as F.I.R. or First Information Report duly signed by the authorized police personnel. The F.I.R. is not necessarily a limiting statement and may be subsequently expanded. In a case of physical violence having been inflicted, it is necessary to insist, at the police station, upon examination by a recognized medico-legal person and upon a medical report being filed along with the complaint. If it is possible, statements of witnesses should also be filed. A complete statement should be filed with as many details of circumstances as possible, no matter how long the statement is. It is possible to file a statement of violence apprehended or anticipated by a woman, particularly if similar incidents have occurred, previously. It is also advisable to include in a specific complaint, any history of violence or cruelty that has not been previously reported. It is not necessary to withdraw a report made at the police station in the event that a compromise has been reached, particularly in the case of matrimonial situations. A second statement of the compromise and its conditions is adequate.

Women's problems in the context of marriage are rooted in the image of her as a dependent passing from the custody of her father to that of her husband. As such, her individuality, her rights, her needs, are automatically subject to those of her husband and then to her in-laws, since they are related to her husband.

In the present economic set up, her work in the house, far from being seen as subsidizing her husband's and adding value to market goods is denigrated and in fact not visible in economic terms. The system depends on her for producing, socializing, training and nurturing its future and present work force and then makes this major function she performs degrading or at least unimportant.

Even the marketed function she performs are undermined in status and cost due to the circular logic that since she depends most of her time and effort in "unproductive" labour, the "productive" work is of lesser value.

Being thus stripped of all economic power by such a system and being further impoverished by the patriarchal patterns of inheritance, she is at the mercy of her exploiters. The law, designed for and by men does little to remove the disparity that actually exists since it would upset all established economic and social processes.

In Hindu Law she is seen as merging her identity with her husband and the two are considered one entity, represented by the husband. In Muslim law she is equal to half a man for all legal and social purposes. In Christian law she is subject to her husband as the body is to the head.

Now, in respect of property matters, the husband and the wife are two different persons. They can own separate property; they can even sue each other to settle property dispute. The share of one spouse on the death of the other is now regulated by law.

In respect of criminal matters, husband and wife can not be guilty of conspiring together, or of larceny from each other while living together. Certain matrimonial communications are privileged. One spouse is not normally compellable to give evidence against the other, but may give, in general, evidence on behalf of an accused spouse.

Despite laws that provide for some relief to her in case of marital violence, inspite of the avenues open to her on paper to seek redress of marital grievances in the Courts, in practice she is constantly urged to submit, to adjust, to have patience. She is denied access to information and education, with the result that she is alienated from the economic and social mainstream.

Recognizing the needs of women for legal aid and a place of shelter under conditions of abandonment particularly when the women are minors, the State has attempted to provide legal aid cells and "*nari niketans*".

Regrettably these institutions, though the intent has been admirable, have not succeeded in alleviating the situation of women at all, being firstly inadequate in their scope and extent and symbol of refuge but one of state instituted oppression and exploitation of women under its care. In order for effective implementation of the laws that do exist and to create changes in the laws themselves, it is important for women to work in and through groups.

Different groups whose work is concerned with the assistance of individuals who need legal aid to affect their rights and/or the empowerment of women are already functioning. There is a need for more. As people become more aware of their rights as individuals, as human beings they will seek to make these rights enforceable, and organization is the only way to make the needs of individuals recognized by what is obviously and exploitative system.

Women's groups have, in the short-term that they have been in existence focused on the problems of women, conducted various studies and assisted in the process of emancipation and change both in the lives of individuals and on the policy and law making levels.

It is important, therefore, that the work started and being carried out by existing organizations is strengthened by increased membership and by the formation of new groups. The state aid is also essential.

It is a healthy trend that more and more women are seeking solutions to the common problems they face, collectively, and one that must be encouraged. However, we see that the disparity of status between men and women, not only in society or in the economy, but in law undermines this idealistic statement.

One major reason for this is the acceptance of the new controversial "personal laws". "Personal law" is no more than the codification of legal customs of different religious communities, governing all aspects of domestic life. It does not cover criminal activity and punishment, which is taken under the purview of a Uniform Criminal Code. All religions in some way or other have a negative bias in the context of women's rights and status. This bias has been ratified and perpetuated

by the adoption of laws based on religious customs. The negative bias in Hindu Law is of minimal degree because of conferment of new status to Hindu women. Any custom which is a conflict of statutory law has lost its validity. In Muslim Law customs still play a dominant role but for this reason emancipation of Muslim women is still a difficult task. The Muslim Law has to provide a better security in a positive form. So that she could emerge with a new identity from the tradition based Islamic law. A very few Acts have been passed to her benefit but one expects more for making her legally, socially and financially independent.

1.10. THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

The Muslim Women (Protection of Rights of Divorce) Act, 1986 undoes the gains of divorced Muslim Woman. It is not correct as a close analysis shows that the Act does nothing like throwing out of window the *Shah Bano's* verdict or the legislative progress enshrined in the provisions of Criminal Procedure Code, 1973. The main features of this enactment may be summed up as the Act accords relief the divorcee. It does not say that *Mahr* is a consideration for divorce for is the sum referred to in Section I27(3)(b) Cr. P.C. It does not lay down that no maintenance is to be paid to the divorcee after *iddat* or that she is to be abandoned for the life after *iddat.*

The preamble of Act says that it is 'an Act to protect the rights of Muslim Women who have been divorced and further to provide for matters, connected and incidental thereto. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, entitles a divorced woman to (i) reasonable and fair provision, and (ii)

maintenance to her, (iii) provision and maintenance to her children for two years, (iv) *Mahr* amount and (v) All properties given to her before, at the time and after her marriage. Out of these, the 'provision' and 'maintenance' are to be made and paid to her within the *Iddat* period by her former husband.

Does it mean that the maintenance is to be paid to her only during the *Iddat* period? The original controversy resurrected in *Arab A. Abdullah v. Arab Arab Bail Mohmuna Saiyad Bhai.*[52] In the instant case, the matter takes into consideration was the validity of an order passed under Section 125 of Cr P.C. in view of Muslim Women (Protection of Rights on Divorce) Act, 1986. The main questions arose in the instant case for the determinations are: (i) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by the Judicial Magistrate of First Class, under Cr, P.C. ordering the husband to pay the maintenance to the wife are nullified? (ii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, takes away the rights which are conferred upon the Muslim divorced wife under the personal law or under general law. (iii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced Woman is entitled to have maintenance during the *iddat* Period only. The divorced wife (the respondent) has filed criminal application under Sec. 125 of Cr. P.C. claiming maintenance allowance, the magistrate granted Rs. 250 per month. Additional Session Judge confirmed the order. Against that order, the petitioner husband filed the criminal application in the High Court. The petitioner husband contended that So far as the first issue was concerned they alleged that in view of the provision of Muslim Women

[52] AIR 1988 Guj 141

(Protection of Rights on Divorce) Act 1986, the orders passed by the magistrate under Section 125 of Criminal Procedure Code is non-est. They relied on Section 7 of the Muslim Women (Protection of Rights on Divorce)Act 1986 to support their argument. In regard to the second issue they contended according to the Muslim Personal Law, the husbands liability to provide of his divorced wife is limited to *iddat* period, despite the fact that she is unable to maintain herself. The reason behind that is that the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 is to nullify the interpretation given by the Supreme Court in Shah Bano's Case . He contended that a divorced woman is entitled to get maintenance from her former husband within the *iddat* period only and that word within should be read as "during" or "for". It was further admitted that if the parliament wanted to provide for future maintenance to the divorced women, then the parliament would not have provided that the said amount should be paid within the *iddat* period but instead of that the parliament has specified the time. Contentions of the respondent wife were thatwith regard to the first issue they submitted that Section 7 of Muslim Woman (Protection of Rights on Divorce)Act 1986 clearly indicates that there is no inconsistency between the Muslim Women (Protection of Rights on Divorce) Act 1986 and the provisions of Cr. P.C. 125 to 128. The provisions of Muslim Women (Protection of Rights on Divorce) Act 1986 grant more relief to the divorced women depending upon the financial position of her former husband. So far as the second point is concerned the and alleged that there is a presumption against an implied repeal because there is a presumption that the legislature enacts the laws with complete knowledge of existing laws obtaining on the same subject and to failure to add a repealing clause indicates that

the intention of the legislature was not to repeal the existing laws. As to the third question they submitted that parliament has provided for making fair and reasonable provision and the payment of fair and reasonable provision and the payment of fair and reasonable maintenance to the divorced women after visualizing and contemplating her future need and the same has to be made within the *iddat* period by her former husband. The Hon'ble Gujrat High Court speaking through M.B. Shah J. reasoned and held as under:

(i) As regards the nullify of an order passed under Section 125 of Cr. P.C. after the enactment of Muslim Women (Protection of Rights on Divorce)Act, 1986, the Court reasoned that there is no Section in the Act which nullifies the order passed by the magistrate under Section 125 of Cr. P.C. Further once the order under Section 125 of Cr P.C. has been passed granting maintenance to the divorced wife then her rights are crystallized. There is no inconsistency between the provisions of the Act and provisions of Section 125-128 of Cr. P.C. On the contrary Act grants more relief to divorced Muslim Women depending upon the financial position of her husband.

(ii) As to the second issue the court relied on the statement of object and reasons as well as preamble of the Act. The Court held that on the plain reading of the Act, it cannot be said that Muslim Women (Protection of Rights on Divorce)Act 1986 in any way adversely affects the personal right of a Muslim divorced woman. Nowhere, it is provided that the rights which are conferred upon a Muslim divorced wife under personal law are abrogated or repealed. It does not provide that it was enacted for taking away same rights

which Muslim woman seeking either under the personal law or general law under Section 125 of Criminal Procedure Code.

(iii) For the third issue, the court held that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for *iddat* only.

The dictionary meaning of the word 'within' is 'on or before' and 'not later than', 'not beyond' therefore the word 'within' meant that he was bound to make and pay the provision and maintenance before the expiration of *iddat* period. It seems that the Judgment is not upto the mark as it could not decide successfully the matter whether maintenance of Muslim Women is only for *iddat* period or beyond *Iddat* Period.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju v. Patumma Beevi,*[53] The question before the Kerala High Court was whether the Muslim Women was entitled to invoke the Section 127 after the Muslim Women (Protection of Rights on Divorce) Act. 1986 came into force. The Session Judge was of the opinion that she could invoke the Section 127 of Muslim Women (Protection of Rights on Divorce) Act, 1986 as the Act contained no repeal, express or implied of the Code. Hon'ble High Court held that the Section 125 to 128 of the Cr. P.C. are not repealed but excluded or restricted. The well known rule of interpretation is that a special law excludes a general law when a special law namely the Muslim women (Protection of Rights on Divorce) Act, 1986 was passed to govern maintenance to Muslim wives, application to general law i.e. under code was excluded or restricted. On giving the answer to the argument

[53] (1989) 1 KLJ 337

that the right under the code is independent of personal law and unaffected., it was the opinion of Kerala High Court that if one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional right. It seems that the Judgment tried to give some clear cut picture regarding the (i)Application of Muslim Woman (Protection of Rights on Divorce)Act, 1986, (ii) Exclusion or restriction of the application of Section 125 to 128 of Cr. P.C. by a well known rule of interpretation that special law exclude the general law; (iii) it tried to reduce the effect of judgment in *A. A. Abdullah's* case which says that the Act gives the additional arrangement for the maintenance of women when maintenance by previous husband fell short of her needs. This judgment clarified that the provisions of the Act is not to provide additional right. The view of Gujrat High Court in *A.A. Abdullah Case* was also not approved by the High Courts of Andhra Pradesh, Guwahati and Calcutta.

In *Usma Khan Bahmani v.Fathimunnissa Begum*,[54] the issues of the case were: (i)Whether a divorced Muslim woman can claim maintenance under Section 125 of Criminal Procedure Code,1973 from her former husband even after the passing of the Act of 1986? (ii) Whether the maintenance contemplated under Section 3(1) (a) of the Act of 1986 is restricted only for the period of *Iddat?* Or (iii) whether a fair and reasonable provision has to be made for future also with in the period of *Iddat.* Here the ratio of Majority judgment was 2:1. The Court held on issue No.1 that Section 3 of the Act of 1986 starts with a non obstante clause as it provides that "not with standing anything contained in any other law for the time being in force....."

[54] 1990 Cr. L.J. 1364 APHC

Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of *Iddat,* is devolved upon the relatives and if the relatives are not available on the Waqf Board.

The very concept of the liability of the husband is limited for and during the period of *Iddat,* under Section 5, it is provided that the husband and wife would be governed Section 125 to 128 of the Cr. P.C if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provision of Sections 125 to 125 of the Cr.P.C.

Further, under Section 7 of the Act, the intention of the legislature is clear when it provided that every application by a divorced woman under Section 125 or 127 of the Cr.P.C., pending before the court or magistrate in the commencement of the Act of 1986, shall note with standing contained in that code and subject to the provision of in accordance with the provisions Section 5 of this Act be disposed of in accordance with the provision of the Act of 1986.

A combined and harmonious reading of the provisions of Section 3 to 7 of the Act of 1986 clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. On the Issue No.2, the court held that the liability of the Muslim husband to pay reasonable and fair provision and maintenance is confined only for and during the period *oilddat.* The concept of reasonable and fair provision and maintenance cannot be read as meaning two different things.The word *"Mafa"* used in *Ayat* 241 in chapter II" of the *Holy Quran* indicates that the word "Provision" and "maintenance" convey the same meaning.

Even in *Shah Bano* case, it is recognized that the word "provision" and "maintenance" convey the same meaning. In such circumstances to say that a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to the negation of the very object of the Act for which Act of 1986 has been promulgated. It would give rise to a new concept of liability on the part of the husband which would be difficult to be translated in concrete term as it would be almost impossible to visualize the future needs of the divorced Muslim woman which would be depending upon the several factor like remarriage, change in the circumstances, or in the life style etc.

Therefore, in regard to the second question the judge held that the liability of Muslim husband to pay the fair and reasonable provision and maintenance contemplated under Section 3(1)(a), of the Act is confined only upto the period of *Iddat* On the Issue No.3 the Court held that under Section 7 of the Act of 1986, it is specifically stated that every application by a divorced women under Section 125 or 127 of the code pending before a Magistrate on the commencement of the Act, shall be disposed of by the Magistrate in accordance with the provision of the Act of 1986, having due regard to Section 5 of the Act and the rules framed there under with regard to the option to be exercised by the parties. Any order of maintenance which is not warranted by the provision of the Act can not be executed against the husband. Therefore the Judge held that the Section 125 to 128 of Cr. P.C is not applicable after coming into force Act 1986, save in so far as the parties exercise their option under Section 5 of the Act, to be governed by the provision of Section 125 to 128 of Cr.P.C. it seems that judgment is good keeping in view of the actual position under the Muslim personal Law and historical background of the Act of 1986. It

has very rightly decided the issues involved in the present case and has clarified the legal position on those issues. It has rightly remarked that divorced woman can not claim maintenance under Section 125 of Cr. P.C., after passing of the Act of 1986, except under some special circumstances. It has held that if it has been recognized that the liability of the husband to pay maintenance is limited to the period of *Iddat,* then there is no justification to hold that the liability of making a reasonable future provision extend beyond the period *of Iddat* under Section 3(l)(a) of the Act. It has remarked correctly that the combined and harmonious reading of the Section 3 to Section 7 the Act of 1986, clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. In this case the majority dissented from the decision of Gujrat high Court in *A.A. Abdullah's* case, and decision of the Kerela High Court in *Ali v. Sufaira,*[55] wherein it was held that under Section 3(1)(a) a divorced woman was not only entitled to maintenance up to the period of *Iddat* but also to a reasonable and fair provision for her future.

The Calcutta High court, also dissented from the decision of the Gujrat High Court in *Abdul Rashid v. Sultana Begum,*[56] in the instant case, the main issues were: (i) Whether the Muslim husband has to provide maintenance to his divorced wife up to the period *of Iddat* or beyond the *Iddat* period? (ii)Can the Section 4 be interpreted to mean that it was open to divorced wife to claim maintenance under Section 4 of the Act in addition to Section 3 of Act. The Hon'ble High Court held on issue 1 that the liability of the husband to provide maintenance was

[55] (1999) 3 Crimes 147.
[56] (1992) Cri. LJ 76

limited for the period *of Iddat* and therefore, she was unable to maintain herself. She had to make an application under Section 4 of the Act. In view of the Act the court held on issue 2, that the provision could not be fairy interpreted to mean that it was open to divorced wife to claim maintenance under Section 4 of Act in addition to what she might have received under Section 3 of Act. This judgment seems to be good one keeping in view of the legislative background of Act of 1986 and actual position of Muslim personal law. This judgment was akin to the principles laid down in *Usman Khan Bahmani 's* case. It opposes the decision of *A.A. Abdullah's* Case decided by the Gujrat High Court. It rejected the interpretation of the Gujrat High Court which laid down that the provisions of the Act is to make an additional arrangements for her when maintenance allowance and provision settled by the previous husband fell short of her needs on account of some unforeseen circumstances.

Yet the Calcutta High Court took a different liberal view in *Shakeela Parveen Ali,*[57] the main Issues were: (i) Whether the term 'with in' used in 1 i (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 be interpreted only as 'for or during' or a future provision may be made within *Iddat* period or for beyond *Iddat* period, (ii) What procedure is to be followed when the petition regarding maintenance under Section 125 of Cr P.C. is pending before the passing of Act? The Calcutta High Court extensively quoted the judgment of Gujrat High Court and approved both the principles therein. The order passed by the Magistrate under Section 125 of Cr. P.C. was not by nullified the Muslim Women (Protection of Rights on Divorce) Act, 1986. The word 'within' in Section 3 does not mean 'for or during', it means 'on or

[57] 2001 (1) CLJ 608

before', and the parliament has nowhere provided that the reasonable and fair provision and maintenance are limited only for the *Iddat* period. Therefore the word 'within' meant the he was bound to make and to pay the provision and maintenance before expiration of *Iddat.* Accordingly it was held that the expression during *Iddat* period should be extended till a Mohammedan divorced female enters remarriage. The magistrate's order was modified to the effect that the petitioner was entitled to get maintenance allowance from the date of application till she remarries. This judgment can't be said upto the mark as it did not pay regard to the historical background of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court under the guise of so called judicial activism tried to extend the meaning of word 'within' unnecessarily. The additional benefit of maintenance to the divorced Muslim women till she remarries was an open encroachment of Muslim Personal Law. The meaning of word 'within' under Section 3(l)(a) of the Act can't be extended 'upto the remarriage of divorcee, while taking regard to the purpose, object & preamble of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Here it would be worth mentioning the case of *Idris Ali v. Ramesha Khatoon,*[58] the question before the court was whether the provision of Muslim Women (Protection of Rights on Divorce) Act, 1986, shall have the application when a divorced woman approaches the court of a magistrate for the execution of final order already *passed in her* favour under Section 125 of Cr.P.C. Petitioner contended that as soon as the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. Sections 125, 127, 128 of Cr.P.C, so far as *divorced Muslim*

[58] AIR 1989 Gauhati 24

women are concerned became inapplicable on Muslim women by virtue of Section 7 of Muslim Women (Protection of Rights on Divorce) Act, 1986. It was also pointed out that such aforesaid order maintenance would become nugatory and non-est in the eye of Law as the right of the parties have to be decided according to the provision of Section 3 and Section 4 of this new Act by virtue of Section-7 of the Muslim Women Protection of Rights on Divorce) Act, 1986. Respondent contended that action 7 has settled all controversy at rest .It was pointed out that Section 7 in terms mentioned that if an application filed by a divorced woman under Section125 or 127 of Cr. P.C., is pending before a magistrate on the commencement of the Act of 1986 then only it has to be disposed of according to the provisions of new Act of 1986. His submission was that condition precedent for the application of new Act was the pendency of the proceedings, under Section 125 and 127 of Cr P.C., on the date of the commencement a new Act of 1986 and once the proceeding is disposed of under Section 125 or 127 of Cr.P.C., by the magistrate then there is no pendency. After analyzing the fact end the law on the point the Hon'ble High Court held that if a divorced Muslim woman approaches the court of a magistrate for the execution of a final order already passed under Section 125, 127 of Cr.P.C., earlier to the new act of 1986, then she will have the right to get the order executed under Section!28 of Cr.P.C., which Section has been excluded from Section 7 of Act of 1986, and Section 7 of new Act of 1986 would not take away the right. It may be said, that this judgment shows the tendency of the judiciary to the application of the provisions of Criminal Procedure Code inspite of the coming into force of Muslim Women (Protection of Rights on Divorce) Act, 1986, which has made the sufficient

provisions for providing the right to the maintenance of Muslim divorcees.

The single bench of the Bombay High Court had considered it just and equitable that the husband should pay the divorced wife the maintenance allowance even after the *Iddat* period, but thought it is necessary that this matter, in the interest of justice, should be re-accessed to full bench for its decision, therefore this revision application of *Karim Abdul Rehman Seikh v. Shehnaiz Karim Seikh,*[59] came up before the full bench comprising Shah J., Smt. Ranjana Desai J., and Fatil J. The four prime questions before the court were:

1. Whether the Muslim husband's liability under Section 3(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 to make a fair and reasonable provision and to pay maintenance is restricted only upto the *Iddat* period or whether it extends beyond *Iddat* period.
2. Whether the Act has the effect of invalidating the orders Judgments passed under Section 125 of the Code prior to the coming into force of Act, that is, whether the Act divests parties of vested rights or benefits by acting retrospectively,
3. After the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 whether the divorced Muslim wife apply for maintenance by invoking the provision of Chapter IX of Criminal Procedure Code, 1973.
4. Whether the family court has the jurisdiction to try applications of Muslim divorced woman for maintenance after coming into operation of Muslim woman Act 1986.

[59] 2000 (3) Mh. LJ 555.

The High Court held for issue No. 1, that a reasonable and fair provision has got to be distinct from maintenance. The word provision has a future content. In the context be of Section 3(1) (a) of this Act, it would mean an amount as would be necessary for the divorced woman to look after herself after the *Iddat* period. This may involve amount for her residence, food, clothing, medicine and the like expenses. So, like Section 125 of the code no maximum amount is fixed here, but the quantum, has got to be substantial having regard to the future needs of the woman. The court concluded that the husband has to pay her within the *Iddat* period but he has to make the reasonable and fait provision for her within the *Iddat* period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women (Protection of Rights on Divorce) Act, 1986 while deciding this amount regard will be had to the needs of the divorced woman, the standards of the life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lump sum payment he can ask for the installment. Further, till the husband makes the provision the magistrate may direct monthly payment to her even beyond *Iddat,* till amount is fixed. On the second Issue, the court held that "The Section of 125 Cr P.C., prior to the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 are not nullified by reason of its coming into force. The Act does not direst the divorced woman's right to get maintenance under Section 125 of the vested in her by reason of the order of he competent court passed prior to its coming into force".

For the issue No.3, the court ruled that "After the commencement of the Act a divorced wife cannot apply for maintenance by invoking the provisions of Chapter IXth of the code. According to Section *5* a

divorced wife and her husband can by an agreement subject themselves to the jurisdiction of magistrate under Section 125 and 127 of the code and agree to be governed by the said provisions (but not without such agreement).

On the 4th issue, the Court held "by virtue of Section 3 and Section 4 of the said Act the application under Section 5 and Section 7 of the Act have to be filed before the Magistrate only. We therefore hold that after coming into force of the Act of 1986 the Muslim women can apply under Section 3 and Section 4 of Act only before the first class Magistrate having jurisdiction under the code. The Family court can not deal with such application".

These case prior to Denial Latifi case can be quoted in brief such as in *Raflq v. Farida Bi,*[60] Madhya Pradesh High Court held that if a divorced Muslim wife wanted maintenance beyond the *Iddat* period, she had to make her relatives/Waqf Board as parties to suit under Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986, as the husband could not be made a party. Virtually this judgment is in the consonance of the intention of the legislature in enactment of Muslim woman Act, 1986. This judgment support the traditional view of Muslim Personal Law that the view of Muslim Personal law that the husband could not be made a party if the divorced Muslim woman wanted maintenance beyond the *Iddat* period.

In *Julekha v. M. Fazal,*[61] again the M.P. High Court held that the Muslim law makes the husband liable for the maintenance of his divorced wife during *Iddat* only. It seems that this judgment of Court

[60] 2000 (2) MPWM 77 MP
[61] 2000 (1) Vidhi Baswar 123 MP

also supported the traditional view of Muslim Personal Law that the liability of the Muslim husband to maintain his divorced wife is only for the duration of *Iddat.* Thus the legal status if the right of the divorced wife continued to be fluid variable according to the views of different High Courts. The main contentious issues were:

I. Whether the fair and reasonable provision was in additions to the maintenance allowance or included in it, i.e. quantum of maintenance.

II. The duration of time for which the husband liability extends whether within *Iddat* or beyond *Iddat* period.

No doubt, the Muslim divorcee's fate was a progressive path:

- In the first stage the husband could get rid of himself of all liability by simply divorcing her.
- The second stage was the 1973 amendment in the Criminal Procedure Code which laid down that husband was liable to maintain her even after Talaq; this was her first stage of acquirement. But the husband found an escape value which was the payment *of Mahr.*
- In the third stage, the Judiciary insisted on making this *Mahr* reasonable.
- The forth stage came when the court insisted on her maintenance, whether *Mahr.* Is given or not.
- The fifth stage was marked by Act of 1986.

The uncertainties, which were led by the different decisions of the

various High Courts had to be settled. The verdict of Supreme Court in *Danial Latifi v. Union of India,*[62] deciding some of the unsolved questions. Issue before the Hon'ble Supreme Court was whether Muslim Women (Protection of Rights on Divorce) Act, 1986 is an unconstitutional on the ground that it infringed Articles 14, 15 and 21 of the Constitution? Contentions of Petitioner were the following:

(i) Section 125 Cr. P.C. is a provision made in respect of woman belonging to all religions and the exclusion of Muslim woman from its benefit would be discrimination between woman and woman.

(ii) A part from the gender justice caused in the country this discrimination further leads to a monstrous proposition of nullifying a law declared by this court in Shah Bano's case. Thus there is the violation of equality before law but also the equal protection of law and inherent infringement of article 21 of the Constitution as well as basic human values.

(iii) If the object of Section of 125 Criminal Procedure Code, 1973 is to avoid vagrancy, the remedy there under can not be denied to Muslim woman.

(iv) The Act is un-Islamic, un-Constitutional and it has the potential of suffocating the Muslim woman and under mines the secular, character which is the basic feature of the Constitution.

(v) There is no reason to deprive the Muslim women from the applicability of the provision of Section 125 Cr.P.C., and consequently, the present Act must be held to be discriminatory and violative of Article 14 of Constitution.

[62] (2001) 7 SCC 740; 11 (2001) DMC 714

(vi) The conferment of the power on magistrate under Section 3 (2) and Section 4 of the Act is different from the right of a Muslim woman like any other woman in the country, to avail of the remedies under Section 125 of Cr.P.C. and such deprivation would make the act unconstitutional as there is no nexus to deprive a Muslim woman from availing remedies under Section 125 of Cr.P.C., not with standing the fact that the conditions precedent for availing of the said remedies are satisfied.

The Contention of respondent in the support of the impugned act, were the following:

(i) Where a question of maintenance which forms parts of the personal law of a community, what is fair and reasonable is a question of fact in that context. Under Section 3 of the Act , it is provided that a reasonable and fair provision to be made *and paid by her* former husband within the period *of Iddat* and when the fact has clearly been stated in the provision , the question of interpretation as to whether it is for life or for the period *of Iddat* would not arise.

(ii) The personal law of any community is a legitimate basis for discrimination, if at all and therefore does not offend Article 14 & 21 of the Constitution.

(iii) The parliament enacted the impugned Article respecting the personal law of the Muslims and that itself is a legitimate basis for making a differentiation; that a separate law for community on the basis of personal law applicable to such community can not be held to be discriminatory.

(iv) The Act resolved all issues, bearing in mind the personal law of

the Muslim community and the fact that the benefit of Section - 125 of Cr.P.C have not been extended to a Muslim woman would not necessarily lead to a conclusion that there is no provision on the Act to protect the Muslim woman from vagrancy and from being a destitute.

The Hon'ble Supreme Court by analyzing these points held that Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down two separate and distinct obligations on the part of the husband, viz,

(i) To make reasonable and fair provision for his divorced wife,

(ii) To provide maintenance for her

The emphasis is not on the nature of duration of any such provision or maintenance, but on the time by which an arrangement for the payment of provisions and maintenance should be concluded namely, 'within the *Iddat* period'.

The Court upheld the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 and observed in para 31 as under:

"Para 31 - Even under the Act, the parties agreed that the provisions of Section 125 of Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred the power to make appropriate provision. Therefore, what could be earlier granted by Magistrate under Section 125 of Cr.P.C. would now be granted by the magistrate under the very Act itself.

The Court finally concluded in para 36, while upholding the validity of the Act. We may sum up our conclusions:

(i) A Muslim husband is liable to make a reasonable and fair

provision for the future of divorced wife which includes her maintenance as well. Such provisions extending beyond the *Iddat* period must be made by the terms of Section 3(1) (a) of the Act.

(ii) Liability of the husband of maintains his wife under Section 3(1) (a) of the Act is not confined to *Iddat* period.

(iii) A divorced Muslim woman, who has not remarried and who is not able to maintain herself after the *Iddat* period can proceed under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, from such divorced woman including her children and her parents. In case of any of the relative being unable to pay maintenance, Magistrate may direct the State Waqf Board, established under the Act to pay maintenance.

(iv) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution.

This judgment can be said the commendable and praiseworthy step of the Supreme Court to upheld the Constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and paid due regard to the feelings of the minority community, i.e., the Muslim Community. As the right of the preservation of personal law is the fundamental right of any community, on that ground the Muslim Women (Protection of Rights on Divorce) Act, 1986 can not be called to run counter to the constitutional mandate. But besides it, it can also be said that in the guise of Judicial activism the court has given the liberal meaning to term within under Section - 3(1) (a) of Muslim

Women (Protection of Rights on Divorce) Act, 1986 by making the husband liable to make fair and reasonable provision within the *Iddat* period, for beyond the *Iddat* period. It must be noted that the making of the future provision beyond the *Iddat* period for the maintenance of the divorced Muslim wife is foreign to Muslim Personal Law. Indian Muslims have their deep feelings and emotional attachment to their personal law, so it can also be said here that the sorry position is that even the Apex court was no more hesitant to venture in the areas well understood and free from legislative *activity.* It is to be noteworthy that as the court refers the question of Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for upholding the constitutional validity of the same, is appreciable. This step of the court tried to avoid the jurisdiction of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

After the judgment *of Denial Latif's* case a very interesting question came before the Bombay High Court in *Sayeed Khan Faujdar Khan v. Zaheba Begum,*[63] the question was that, can a divorced Muslim wife who withdraw an earlier application under Section 125 of Cr.P.C., on the basis of settlement, subsequently claim maintenances under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that earlier settlement made by the parities was binding on the parties. The wife's application under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 is nothing but an abuse of the process of the court. A consent order or settlement arrived between the parties in proceeding under Section 125 of Cr.P.C., operates as estoppels and no party can be allowed to Muslim or abuse the process of court by filing subsequent application under a different act for the

[63] AIR 2006 Bom. 39.

same relief, on the same set of facts or circumstances.

Recently in 2007 a very interesting question came before Bombay High Court that whether a divorced Muslim wife alone can apply for the maintenance from her husband under Section-125 of chapter IX[th] of Criminal Procedure Code, 1973 in *Seikh Mohammad V. Naseem Begum,*[64] the Hon'ble High Court held that Muslim divorced wife alone cannot apply for the maintenance under chapter IX[th] of Cr.P.C., she can only apply under this chapter IX, Section 125 of Cr.P.C,, when there is an agreement between her and her husband under Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been designed to mean that no proceeding can be initiated on the application of Section 125 of Criminal Procedure Code, 1973 by divorced Muslim wife unless there is an agreement between her and her husband to be governed under Section 125 of Criminal Procedure Code, 1973. Application of the Section 125 of Criminal Procedure Code, 1973 is maintainable subject to the mandate of Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Virtually the judgment of the court is good as it held that the purpose of the enactment of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 must be fulfilled. The contrary view of the court would have under that Section otiose. Here the High Court relied on the Judgment of Supreme Court in *Denial Latifi v. Union of India,*[65] in which court upheld the validity of Muslim woman Act, 1986.

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[64] (2007) DMC 226 Bombay High Court.
[65] II (2001) DMC 174

In *Riaj Fitima and Another (Petitioner) v. Mohd. Sharif*[66] *[Respondent]*, the issues before the Hon'ble High Court of Delhi were:

(i) Whether the statement of divorce taken by the husband in the written statement sufficient to constitute divorce?

(ii) Whether in the absence of direct and insufficient evidence to prove divorce, the bar of the Act of 1986, be made applicable in entertaining application of maintenance under Section 125 of Cr. P.C.?

The petitioner alleged that she was still the wife of the respondent and she was turned out of the matrimonial home for the want of dowry.

Respondent husband contended that he had obtained divorce from his wife by the Mufti. He also alleged that in view of the divorce the petition was debarred from claiming maintenance under Section 125 Cr. P.C. Instead of the remedy of the petitioner was to take recourse to the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 as under:

So far as the first issue was concerned it was laid down that mere statement of the husband taken in a written statement that he had divorced his wife on a particular date would not suffice. If this accepted it would be prone to misuse. The court laid down the following perquisites for proving that divorce had taken place:-

- Divorce must be for the reasonable cause.
- There must be a proclamation of Talaq thrice in the presence of witnesses.
- There must the proof of the payment of *Mahr*.

[66] (2007) DMC 26 Delhi High Court

- The husband must prove that there was attempt for conciliation prior to divorce,

As far as the second contention is concerned the court relied upon on *Salim Basha v. Mumtaz Begum,*[67] where Madras High Court opines that Talaq was not valid if there was no valid evidence of pre-divorce conference for the settlement by two mediators from both sides. The Court held that respondent could not proved that he had divorced his wife and, thus the bar of the Act of 1986 was not applicable in entertaining the application of the petition under Section 125 of Cr. P.C.

This judgment is based on the Judgment of the Supreme Court in *Shamim Ara v. State of U.P.*,[68] wherein the court held that' *Talaq* to be effective has to be explicitly proclaimed'. Thus in the present social welfare context the judgment is praiseworthy as it lays down that for a valid *Talaq* the prerequisites of the valid *Talaq* must be fulfilled. It will be helpful in the future to reduce the abuse of the authority of the Muslim man of giving his wife divorce arbitrary and in rash manner. Here it was clearly settled that mere the written statement of the husband that he had divorced his wife on a particular day will not be sufficient to prove divorce.

In *Tripura Board of Waqf* (petitioner) *v. Ayesha Bibi*[69] *[Respondent],* the issue before the Gauhati High Court was that whether the Waqf board can be directed to pay maintenance amount without offering a opportunity of hearing before passing the order? The petitioner contended that there is no provision in the Act of 1986 to pay a

[67] 1991 (Criminal)
[68] J.T. 2002 (7) SC 570
[69] AIR 2008 Gauhati 10

maintenance allowance to a divorced Muslim woman by the Waqf Board, unless there is a specific order of competent court of law. He has submitted that before passing the initial order, the Waqf board ought to have been heard by the learned CJM.

Countering the contentions of the petitioner, the learned council for respondent submitted that the whole exercise on the part of the Waqf Board is to frustrate the claim of the respondent wife for the maintenance. As regard the notice to the Board, he has submitted that such notice is not contemplated in Section 4(2) of the Act nor in any provision of the Act, In this contention he has placed his reliance on the two decision of the Apex cast in *Syed Fatima Machrs* and *Denial Latifl's* case. The learned Judge held that the plea of the petitioner board that before passing the order, they ought to have been heard, it will be suffice to say that no such provision is discernible in the Act. Section 4(2) of the Act provides that where a divorced woman is unable to maintain herself and she has no relative in Subsection 4(1) or such relatives have not enough means to pay the maintenance ordered by the magistrate or other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the magistrate to be paid by such other relatives under the second proviso to Subsection (l),the magistrate may by order direct the State Waqf Board to pay such maintenance as determined by him.

Is seems that in the present case the petitioner board instead of acting towards implementation of the object and reasons for which the aforesaid Act of 1986 was made, resisted the same making all efforts. Therefore, the court should resort to prompt implementation of the order.

The concept of judicial activism which is another name of innovative interpretation was not of the recent past. The twin concept of judicial review and judicial activism were said to be born simultaneously. The judicial creativity may yield good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences generating conflicts which may lead to the agitation to a particular community or group.

The common criticism we hear about the judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges metamorphose into legal principles and constitutional values. On the other facet of this line of criticism is that in the name of judicial activism, the theory of sepration of powers, is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them Judicial activism can be compared with legislative activism. The latter is of two types: (i) *activist law making* ; *(ii).dynamic law making* . Activist law making implies the legislature taking the existing ideas from the consensus prevailing in the society. Dynamic law making surfaces when legislature creates an idea outside the consensus and before it is formulated, propagates it. Dynamic law making always ordinarily carries with it legitimacy because it is the creation of the legislatures who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle.

Thus from the above discussion on the case laws regarding the maintenance of the divorced Muslim wife, I feel that judiciary has taken the double standard in the interpretations of the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

On one side the decisions of various High Courts and Apex Court upheld the constitutional validity of Muslim Women (Protection of Rights on Divorce) Act, 1 986, but on the other side I, may fee] sorry to say that by unnecessarily *interpreting the provisions of Muslim Women* (Protection of Rights on Divorce) Act, 1986, the judiciary has tried to venture in the areas well understood and free from legislative activity.

During the process of the analysis of the background history and spirit of the Muslim Women (Protection of Rights on Divorce) Act, 1986, I felt that Indian Muslims have deep emotional feelings regarding their personal law. Their personal law is constitutionally recognized and judicially enforced. It is pertinent to point-it-out that the judiciary while interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, should pay due regard to the sentiment and emotion of the Muslim community, as "religion, ethics and law are therefore, so intermixed in Islam ..... "[70]

[70] Faizee A.A.A., Modern Approach to Islam 32 (1981 ed.) p. 36.

Concluding Remarks & Suggestions

CONCLUDING REMARMS
And
SUGGESTIONS

In India the post-independence era has gradually but definitely produced a new jurisprudence, the evolution of which may be hailed as an evolution in our society and politics. But the result it is viewed has not been quite appreciable. In the last decade attention was paid to improve upon the status of women and it was felt that there was more need to arouse the consciousness of society towards the recognition of her identity and freedom. The unsatisfactory condition of women particularly in a developing country like India has inspired the humble soul to carry on this work. When one is reaching at the door of 21st century, boasting alone will not suffice and one has to make positive and constructive efforts in right direction to achieve the said goal. An effort is being made through this work which, it is thought will be quite useful to governmental machinery, social scientists and law reformers and champion of gender justice to find out ways and means to improve upon the status of Indian women.

The position of Hindu women during the *vedic* era was at par with men. In every social and religious ceremonies, she was associated with and actively involved. In the post-*vedic* era, the status of Hindu women gradually deteriorated and she was regarded as subservient to her counterpart i.e. male in all social and cultural activities. This condition could not improve even during the British rule. In the later part of the 19th century, national leaders and social reformers tried their best to improve upon the status of Hindu female. After independence, the

Constitution of India envisaged socio-economic equality to all Indian citizens, irrespective of caste, creed or sex. No efforts have been spared in passing non-discriminatory legislations for the upliftment of socio-economic status of Hindu woman by the Indian Parliament.

In western countries, women were not given the right of franchise earlier as the rise of feminist jurisprudence is the testimony of the effect. Fortunately, after independence India did not allow such conditions to prevail and from the very beginning Indian women were given equal status to contest and vote. The People Representation Act, 1951 provides that every Indian citizen who has attained the age of 18 years is eligible to cast vote[1] and every one is eligible, subject to prescribed conditions, to contest election for the respective legislative bodies. There is neither special protection nor discrimination on the ground of sex to encourage or deprive woman to exercise her voting right or to contest or vote but it does not serve any purpose in the present day Indian polity. Still only 17 per cent of Indian women are literate. And only a small number of women know the value and importance of their voting rights. Even one per cent of the total women folk do not like to come in the public life and contest the election. Till 1970, Hindu women could not understand the value and importance of their voting rights and were solely dependent on the advice and directives of male members. Education, social awakening, employment opportunities and efforts of certain women organizations have now created an environment where women in general and Hindu women in particular are now aware of their voting right, its values and importance. A drastic change has been witnessed in the voting pattern

[1] Representation of the People (Amendment) Act, 1989; and Sixty-First Constitution of India (Amendment) Act, 1989 which reduced the voting age from 21 years to 18 years.

during 1970 and 1980. It was observed that even ruralite Hindu women are independent and conscious of their voting rights. The need of the hour is to provide reservations for women in legislative and administrative bodies so that this group may protect and promote their own interest.

The researcher agrees that declaring child marriage void could create a chaos in the society. The law should take any other alternate drastic step for preventing child marriages. It is suggested that the enforcement agencies and officers in the social welfare department should report the incident of child marriage so as to penalize erring parents of brides and bridegrooms. Registration of marriages may be made compulsory and that would be possible only when the brides and bridegrooms are of the required age.

Prostitution is one of the most heinous offences against the dignity of women and a slur on the face of a civilized society. The Constitution of India declares its faith in the dignity and worth of human being by incorporating the cherished goal of humanity, justice-social, economic and political for all. It prohibits immoral traffic in human beings and declares it to be an offence punishable under its Article 23. To fulfill this there is the Suppression of Immoral Traffic in Women and Girls Act, 1956 (now the Prevention of Immoral Traffic Act, 1986). Under this Act, prostitution as such is put to an end but has it been checked no, rather it has taken newer forms.

There are inherent flaws in the Act, for example, the externment order for the prostitutes is like depositing garbage at others doors. It is highly counter productive. The alarming dimensions of this

exploitation are not unknown. The call girl culture has come into existence. Five Star Hotels, Massage Parlours and Fashionable Bars, all have call girl system and sale of flesh. The well advertised entertainment offered by Bars, Hotels, Turkish bath and Massage in big cities is often a thing in disguise for the actual prostitution market. The abuse of power, economic, political and administrative factors create such circumstances in which women employees are tempted and at times prepared to barter themselves and their families. This is a new form of prostitution which goes on unobserved by the society and law enforcement authorities because it does not fall in any category of offences connected with prostitution. To deal with the problem of prostitution, it requires a more action oriented research in a new perspective for its control.

Almost every day there is news in the newspapers of "dowry deaths and criminal cruelty to women". It gives realization that women in India are still treated as play things and faithful servants of their male counter-parts. In *Shastric* era Hindu women have been suffering in silence. They were only asked and urged to sacrifice their interests and happiness. Time and again there has been a hue and cry in the press and social pressure from voluntary organizations to prevent inhuman treatment of women in their matrimonial homes especially on dowry demand and daughters' birth. The Dowry Prohibition Act, 1961 has also been amended with intent to make it more effective in curbing the practice of giving and taking dowry and the resultant harassment of women by their husbands and in-laws. Recognized welfare institutions or organizations have now been permitted to lodge complaints before the Magistrate for the harassment of women in their matrimonial

homes on account of dowry demand. A survey on theme: "why women burn" was conducted in 1983 which revealed that the oppressive attitude towards a married woman by her husband and in-laws remained on two counts: either because of insufficient dowry or on her giving birth to a female child.

The Constitution of India being the supreme law of the land, enjoins equality of sexes but unfortunately Indian society is still harsh to women in the same way as it was during the period of Manu. Inspite of discriminatory provisions for the protection of women and drastic amendments in the criminal laws, crimes against women are on the increase. Reduction of crime against women remains a wishful thinking. There is a constant increase in the criminal exploitation of the weaker sex.

What course other than suicide is left for a woman, especially when parents in India push her married daughter back to a disgraceful life with her in laws rather than to stay her with them or encourage her to make a life of her own?

The plight of Indian women did improve much even during the British period. A very few legislations could be passed at the instance of social reformers of British people during the British period but it did not ameliorate the condition of Hindu and Muslim females in particular and the Indian women in general. The legislative measures could only provide transitional relief and hope for survival but the environment and the public mood and opinion could not stand against social bias emergence from religious bias to show the willed psychology of males to free women from systematic subjugation. India

became free in 1947 and the Constitution of India came into operation in 1950. A new society and social order thus took birth. It was a society based on democratic norms. The new culture showed its sign. Prof. Deicey's conviction that from Coolie to the Prime Minister should be treated by the same law of the land and like should be treated alike became true theoretically after the enforcement of the Constitution of India. This Renaissance period is responsible to encourage women in general to fight for their identity and seek participation in public life. She now wants to be an active member of the changing pattern of the world. In every part they not only fight for the right of franchise, social and political activities, safety and security in hazardous private and public enterprises, but are devoted for ensuring their self-respect and dignity. The focus, it may be stressed is on the fact that a consciousness of right, liberty, freedom and engagement in public activities began to take its germs. Conditions of societies in every part of the world began to change in the 19th century. It saw the origin of a new concept of equality before law that no one should be discriminated on the ground of caste, creed, sex and religion. This noble principle of universal appeal gave a new lease of life to the words of Mahatma Gandhi, Lokmanya Tilak, Swami Dayanand and others that women should not be deprived of education and participation in the social and political life. The abolition of *sati Pratha,* punishment for arranging child marriages and the social approval and legal recognition for widow marriage and disintegration of Hindu Joint family howsoever slow it may be in the early Nineteenth Century opened the new vistas for her struggle in seeking a new identity of her own and finding a base for developing her personality. Equality before law in true democracy is a matter of right.

In 1950, the Constitution of India in its preamble provided ideals and aspirations of the people of India. The chief one of which was the equality of status and of opportunity. Article 14 of the Constitution partly incorporated the Dicey's principle- of equality before the law and partly the American concept of equal protection of laws. The equality clause expressly prohibits discrimination on the basis of race, religion, caste, sex and place of birth and guarantees of equality before the law and equal protection of laws irrespective of race, religion, caste, sex etc. Thus the Constitution has ensured equal status to all i.e. not only between men and men, women and women but also between men and women. This constitutional spirit found a distinct place and recognition in Hindu law legislations passed in the years 1955 and 1956 affecting matrimonial and property matters. In every sphere of domestic life the Hindu woman was treated at par with man whether it was the case of matrimony or marital rights or right to adopt and be adopted or to exercise the rights of guardianship over the minor children. It was conferment of a new status on her under the constitutional framework for the first time in the history of Free India. A new chapter was thus opened to improve her position and status in the family and accord a new personality and identity. The Hindu Succession Act, 1956 with the help of its sections 6, 8, 14 and 30 conferred a substantial and positive proprietary status on her and this showering of constitutional blessings could became a solid background for enriching her property rights. The legislative effort and judicial activism, if carried on persistently and uninterruptedly in its right earnest; with desired enthusiasm and zeal; with boldness and courage and with dynamism the day would not far off to grant her emancipation in general, the base has been laid down. It simply requires strong will,

a great determination and concerted will of each and every unit of the society to translate the aspirations of the Honourable members of the Parliament and make it a reality.

Article 14 of the Constitution ensures equality of status to all men and women. All men and women are equal before the law and are entitled without any discrimination having equal protection of laws. It recognizes women as a class. It removes disability attached to-women by passing the Hindu Succession Act, 1956. This Act has declared in an unequivocal term the property of the women belongs to her as her absolute property. Further, Section 8 of Hindu Succession Act has put female heirs at par with male heirs. Under Section 22 of the Hindu Adoption and Maintenance Act, 1956 allows illegitimate daughter to claim maintenance from those who take the estate in which she has a share and is not obtained by her. This preferential treatment is not violative of Article 14, as it puts daughter equal to son. In *C.B. Muthamma v. Union of India,*[2] the court upheld the principle of equality before law and held that denial of right to employment to married woman was discriminatory on the ground of sex. The Court upholding the principle of equality to status held that the female employees be treated at par with the male employees. The Orissa High Court *in Radha Charan v. State,*[3] held that the rule was discriminatory on the basis of sex if a married woman was disqualified from being selected at post of District Judge. The Supreme Court of India from time to time held the view that for being of fair sex if some disability was attached to woman it amounted to hostile discrimination against her being violative of Article 14 of the Constitution. Mr. Justice Fazal

[2] AIR 1979 SC 1868
[3] AIR 1969 Ori. 237

Ali in *Air India v. Nargesh Meerza* and others,[4] **5** held the rule violative of Article 14 if Air India Employees service Regulations provided that an Air Hostess was to resign from service: (a) upon attaining the age of 35 years, or (b) on marriage if it takes place within 4 years of service, or (c) upon first pregnancy whichever occurred earlier.

Mr. Justice Fazal Ali observed that termination of services of an Air Hostess under such circumstances was not only a callous and cruel act but an open insult to an Indian Womanhood. No civilized Society could ever allow it because it was unfair to women. A number of cases have been decided by the Supreme Court of India in which the women have been saved from discriminatory treatment under Article 14 of the Constitution. Section 354 of Indian Penal Code and Section 125 of Cr. P. C. too provide right and protection to women. Article 15 provides that no discrimination can be made by the State in matters of rights, privileges and immunities on the basis of sex. It also provides the making of special laws in favour of women and children. Numerous laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women, advertisements and films, female child marriage, atrocities and molestation, abduction and rape, maternity benefits, medical termination of pregnancy, prohibition of prostitution and trafficking in women, protection of employment etc. The decisions of the Courts have served as a right signal for the Indian legislators to enact new laws or to bring about the changes in the existing ones with a view to afford better protection to women. Article 16 prohibits discrimination on the basis of sex in matter of employment. Sex can

[4] AIR 1981 SC 1829

not be sole ground of ineligibility for any post. She can not be denied promotion for being woman. Mr. Justice Krishna Iyer observed in *C. B. Muthwnma* v. *Union of India,*[5] that "we do not mean to universalize or dogmatize that men and women are equal in all occupations and in all situations and do not exclude the need to pragmatise where the requirements of peculiar employment, the sensitivities of sex or the handicaps of either sex may compel selectivity, but save where the difference is demonstrable, the rule of equality must govern.

Article 23 of the Constitution prohibits trafficking in human beings and forced labour. Similarly, Article 24 prohibits employment of any child (which includes a female child) below the age of fourteen years to work in any factory or mine, or engage in any other hazardous employment. A brief analysis of these provisions would reveal how much our founding fathers were concerned in not only protecting the interests of women but also to ameliorate the conditions of this lot in totality. Forced labour in any form including Beggar and traffic in human beings is completely prohibited and any contravention of this provision has been declared an offence punishable in accordance with law.

In pursuance of the above provisions the state has enacted a number of Acts.[6] A remarkable feature of this Article is not only the protection of the interest of women but also to ameliorate her condition in all walks of life in totality. The Constitution is the saviour of dignity as it saves her from indecent exposure. The Constitution has also taken care of

[5] AIR 1979 SC 1870

[6] Suppression of Immoral Traffic in women and Girls Act, 1956 amended as Prevention of Immoral Traffic in women and Girls Act, 1986; Indecent Representation of women (Prohibition) Acl, 1986; The Bihar Harizan (Removal of Civil Disabilities) Act, 1949; The Payment of wages Act, 1936; Bonded labour system (Abolition) Act, 1976; Employment of Children Act, 1938.

health, and protection of female workers. It also provides safety against exploitation of young females below the age of 14 years in employment. A number of Acts have been passed to attain these objectives.[7]

It appears that the Indian legislature is fully conscious about the need to protect the interest of women and to give them a status equal to their male counterparts in the society. However, the enforcement aspect generally remains neglected and needs improvement.

The evaluation of the status of women in India has been a continuous process of ups and downs through out the history. From the *Vedic* era to the present day, there has been a variform up and down falls in the position of the Hindu woman.

The Vedic *Samhitas* refer to women taking active part in agriculture and other crafts like leather work, making gur, drawing water; churning butter milk, making wine, weaving mats and sewing. They were also in charge of house hold finances and they were farm labourers. Some of the upper class women were highly educated and actively participated in intellectual, philosophical discussions. One comes across references to lady sages like Gosha, Apala, Lopamudra, Indrani, Gargi and Maitreyi. During the *Vedic* period girls and boys were initiated into the *Vedic* studies by performing a rite called 'upanayam ceremony: *Rig Veda* shows that women had other careers open to them apart from a more literary career. They entered fields of teaching, medicine, business, military and administration. The wife

[7] The Factories Act, 1948;The Mines Act, 1952;Employment of Children Act, 1938;The Merchant Shipping Act, 1958; the Motor Transport Workers Act, 1951; the Bidi-Cigar Workers (Conditions of Employment) Act, 1966; the Apprentices Act, 1961; the Plantation Labour Act, 1951.

enjoyed with her husband full religious rights and regularly participated in religious ceremonies. In fact, such ceremonies were invalid without the wife joining her husband. It is further ordained that the woman whose hand is accepted in marriage should be treated with respect and kindness and all that is agreeable to her shall be given to her. All these indicate that woman held status equal to man and there were considerably fewer restrictions on her activities outside her home. The wife was always supposed to participate in religious ceremonies along with her husband. In fact, no religious rite was complete without her presence. A home without the wife is like wilderness. The subordinate position of women became an accepted cultural norm for the majority section of the population until the beginning of the nineteenth century.

A perusal of the *Dharmashastra*, i.e. various Smritis show that woman hardly possessed a legal position and was, therefore, almost incapable of possessing any property. *Manu* also subscribes to this view that women have no property of their own.

Over *Stridhan*, woman had an absolute right including the right to dispose of the property. She might alienate in favour of any person which could not be questioned even by her relatives, including her husband. Manu was of the opinion that woman was incompetent for administration. Woman could not be a good head of the State. He also prohibited the king from consulting the woman for secret missions, because woman betrays secret acts. Further, he was of the opinion that women could be qualified witness for women only and not for others. Thus he did not rely on woman as witness.

The Directive Principles, under various Articles, provide special favour to women and direct the State to treat men and women equally. Article 38(2) directs the State to eliminate inequalities in status, facilities and opportunities. Article 39 provides that equally all men and women have the right to have an adequate means of livelihood and further, that there shall be equal pay for equal work for both men and women. To achieve this objective the State has passed, the Equal Remuneration Act, 1976. Article 42 provides that the labour must be provided just and humane conditions of work and maternity relief. Article 43 provides that the State shall endeavour to secure a "living wage" and "decent standard of life" as a result of which the State has made suitable amendments in Factories Act, Mines Act, Plantation Act, etc. However, in 1987, the Parliament has amended the Equal Remuneration Act, 1976, having in view the pathetic condition of the unorganized sector, in order to ensure equal wages to all including women. The States have been directed by the Centre to enforce the provisions of the equal Remuneration Act strictly.

Women have acquired somewhat a respectable position through the Hindu law legislations now. An analysis of class I heirs reveals that out of 12 heirs, eight are female heirs and in schedule of class II heirs, ten out of twenty heirs are female. The most important change made by the Act is that daughter has been treated with son at par. Further, position of woman has been discussed in the light of Sections 15, 16 and 23 of the Hindu Succession Act. The discussion reveals that this Act has brought revolution in the process of Hindu law affecting society, culture and family behaviour and extolled the Hindu woman. The revolutionary changes brought about by the Hindu Adoption and

Maintenance Act, 1956.

It has also been made clear in the light of the Supreme Court decision *Appaswami Chattier v. Sarangapani Chattier*[8] that the adoption made by a widow cannot be declared valid or void on the ground of her motive. Under the present law the woman adopts a child for herself and not for continuing lineage of her husband. Thus, such changes are in accordance with the changing socio-economic position and status of woman. The rights and capacity of Hindu Woman have been discussed in the light of Sections 6,7,8,9 of the Hindu Minority and Guardianship Act, 1956, which reveals that the Act has not made very radical changes. It continues to maintain that the father shall be the natural guardian of child and in his absence only a mother can become a natural guardian, but the judiciary has taken a bold step and declared that mother can be natural guardian during the life time of the father if it is for the welfare of the child. The discussion deals with also the right of maintenance of a Hindu woman in the light of the changes made by the Hindu Adoption and Maintenance Act, 1956. This reveals that the legislators have carefully kept in mind the interest of Hindu woman paramount.

The modern trend in law is towards the realization of certain values, namely, the equality of sexes, social and economic security for women and the development of secular outlook. The success or failure of marriage laws depends upon the extent to which they seek to realize these values.

Marriage and divorce are the most important institutions. On the one hand these are personal institutions. On the other the very basis of our

[8] 1978 SC 1051

society depends on these institutions and so their social aspects become extremely important. Marriage is now a basis of harmony and the foundation of co-operative endeavour.

It reveals that prior to Independence, the *Shastric* laws of marriage, succession, guardianship etc. were heavily biased against the wife. After Independence, however, most of the inequalities in respect of marital rights of Hindu wife have been sought to do away with through legislative measures. The basic objectives of these enactments were to confer equal rights and status on both the spouses and to ensure justice to Hindu wife in their matrimonial home. However, these legislative measures though aimed at extending protection to women in their matrimonial home ignore many major aspects and there are plenty of loopholes in the existing laws. The present study also reveals that these laws are not applied in the manner to accord rightful justice to the Hindu wives who are yet to secure legitimate rights and position in the matrimonial home. Very few have been benefited from this reformative and protective drive .Giving an account as to why the reformation drive by way of Hindu Code failed to deliver the desired good, M.Kishwar says:

> *"In the first decades of Indian independence, the codification and reform of Hindu personal law was hailed as a symbol of the new government's supposed commitment to the principles of gender equality and non-discrimination enshrined in the Constitution. This history of Hindu law reform, however, shows that when reformers claim to speak on behalf of huge segments of population, whose traditions and institutions they have no real knowledge of, they are more likely to do harm than good. Reform, to be meaningful, has to be based on creating a new social consensus".*

The author then continues:

> *"There is almost no principle introduced by the Hindu Personal Code which did not already exist somewhere in India as accepted law. On the other hand there were several existing, much more liberal principles which were decimated by the Hindu Code. In their determination to put an end to the growth of custom, the reformers were putting an end to the essence of Hindu law, but they persisted in calling their Codification 'Hindu'.*

Finally, the author sums up with the following note:

> *"Yet, the overall effect of the misleading rhetoric used of codifying law only for Hindus without giving them any option, and of trying to stamp out diversity in the name of Hindu unity was negative, insofar as:*
>
> *(1) It gave Hindus the false notion that Hindu women now have equal legal rights, which is far from being the case;*
>
> *(2) It created a myth that reformed Hindu law is 'secular', not 'religious' or 'personal' whereas Muslim Personal law i.e. 'religious', therefore backward and can be secularized only by Hinduising it;*
>
> *(3) It left Hindu with a ridiculous sense of grievance. They have begun to believe that Hindu men are worse off than Muslim men because the former have been deprived of 'rights' that the latter enjoy. [Thus it ends up] "Causing a deep rift between the Hindus and the Muslims".*[9]

As regards Christian law, it still remains in a chaotic state. It is unfortunate to note that the Christian Marriage and Divorce Bill made no headway as also the Indian Divorce Act is dreadfully antiquated. The Parsi family laws suffer from dichotomy. The Parsi of the presidency towns and those living outside are not governed by the

[9] Madhu Kishwar, 'Codified Hindu Law: Myth and Reality; Economic and Political Weekly, Aug. 13, 1994. The paper was originally presented at a conference held at Oxford from May 30 to June, 1, 1990.

same law. Their law is partly codified, and the procedure for application of divorce and related relief is not well designed. Very little is known about the family law of the Jewish community living in India A Jewish wife enjoys limited right to obtain a divorce by application to the Jewish panchayat. This segment of our family law regime has received no attention so far. It needs ardent attention. Even after the codification of Hindu law, the scheduled tribes particularly those who come within the definition of term 'Hindu', are exempted from its operation.

The changes in the world situations have had a great impact on the Islamic world and on Muslim community living outside the world of Islam. In India also there arose a movement of social change which gained momentum much before the declaration of Independence that ushered in an era of social legislation seeking to codify and modify the old marriage laws. The Muslim Personal Law (Shariat) Application Act, XXVI of 1937 is most important legislation in the closing years of British regime in India. The Act almost abolished the legal authority of customs among the Muslims of British India. The position of Muslim women, in few cases, was seriously undermined by then prevailing customs. Inheritance in particular had continued to be ruled by, often excluding women, among numerous communities of Muslims. The Shariat Act aimed at correcting such defects. It applies to all Muslims in India in the matter of marriage, various forms of its dissolution, dower, maintenance, guardianship, intestate succession (except the question relating to agricultural lands) and gifts, trust and wakfs (with exception to charities and endowments). The Dissolution of Muslim Marriages Act, 1939 was passed empowering the Muslim wives to

secure the dissolution of marriage by the court of law on specified grounds. Many state Governments also passed legislations, such as Assam Muslim Marriage and Divorce Registration Act, 1935, Orissa Mohammedan Marriage and Divorce Registration Act, 1949. And then there developed a bottleneck on the question of loss of faith and identity as a Muslim.

While bigamy has been made an offence for Hindus and the second marriage is void in law, such marriages are still prevalent. This law has become harmless to bigamist because of some procedural as well as substantive lacunae in it. In a considerable number of cases because of technical construction placed on Section 17 of the Hindu Marriage Act the existing penal provision against bigamy is defeated.

In the Hindu society polygamy was in vogue since time immemorial. The situation underwent a change with the passage of the Hindu Marriage Act, 1955 which made monogamy legally compulsory for all Hindus. Despite the law, certain devices have been engineered by the irresponsible persons to make it possible for them to get a second wife in the presence of their first one. Some of these new devices are *maitri karars* and conversion.

India, a country of diverse religions and personal laws permits conversion from one religion to another. Among various personal laws operative in this country, bigamy is allowed only by Muslim Personal laws. Sometimes a non-Muslim in order to take a second wife in the presence of his first one resorts to 'sham conversion' to Islam,[10]

[10] "Hema (Malimi) met Dharmendar, a married man with grown up children--- Even though Dharmendra did not divorce his wife Prakash, Hema agreed to being a second wife, despite this being illegal.In fact many Bollywood people converted to Islam just to marry again, another one being Mahesh Bhatt"- Nawalesh Pathak, "Why actress fall for married men". The Asian Age

thereby defeating the object of monogamous marriage law. The newly emerging trend of dishonest marriages through *malafide* conversion, if not checked in time, would cause the major source of trouble for women and society in near future. No doubt our Constitution guarantees to all citizens religious freedom including the option for conversion from one faith to another. But then it must be a *bonafide* and sincere conversion. This noble provision of our Constitution, under no circumstances, be allowed to be misused to trigger the unhappiness for women in their matrimonial home. Among the existing Indian personal laws Parsi marriage law and the Special Marriage Act, 1954 prohibit second marriage by conversion.

The restitution of conjugal rights came to be introduced in the Indian courts during the British regime.[11] Perhaps it was based on the notion of sound public policy and natural justice.[12] The relief emanates from the concept of 'consortium'[13] and was extended to both spouses,[14] though in actual practice it is the husband who in most of the cases appears as plaintiff in his attempt to secure the society and company of his wife.[15] The paucity of the number of wives coming forward with such plea reflects the peculiar Indian social set-up wherein the wives' lack of courage to espouse their cause is manifest.[16]

In a restitution petition the real object is hardly achieved. It fails to bring about reconciliation between the contending parties who desperately find ways for separation. It serves no purpose other than

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(Sunday number) 1 September , 1996.

[11] Paras Diwan, The Modern Hindu Law (1976), p. 164.

[12] R.K. Agrawala, Matrimonial Remedies under Hindu Law, (1974), p. 10, Mohammad Shabbir, Muslim Person law and judiciary (1988) p.

[13] A.A.A. Fyzee, Outlines of Muhammedan Law (edn. 4th) p. 121.

[14] K.P. Saksena, Muslim Law as Administered in India and Pakistan, (1954), p. 207.

[15] *Kateeram Dokanee v. Mst. Gendhenee*, (1875) 23 Soth WR 178.

[16] Supra note 62.

providing psychological relief to the plaintiff who is determined to expose the other party in public. A perusal of the restitution cases under the Hindu law since 1954 has confirmed the fact that the restitution petitions were either to defeat the maintenance claim of the wife or to create conditions for divorce. It equally holds good, for cases under the Muslim law.[17]

Lord Gorell observed that permanent separation without divorce has a distinct tendency to encourage immorality and is an unsatisfactory remedy to apply to the evils which it is supposed to prevent.[18] As soon as decree of judicial separation is passed, the petitioner is permitted to live apart from the respondent. Generally at this stage both the spouses are young. And there is danger of their indulging in immoral practice. It is often used as a stepping stone for divorce, the preliminary stage *to* reach the final stage. The decree of judicial separation opens the door for divorce. If the spouse obtains the decree on the ground of cruelty, and cohabitation is not resumed for one year after the passing of decree, divorce can be finalized by either party.

It is submitted that now-a-days the law is being manipulated at the connivance of both Judiciary and Legislature. Such a position should not be allowed to continue, for law cannot be a party to fraud or ambiguity. Section 13 (1-A1 (i) of the Hindu Marriage Act has been criticized as most unfair, because once judicial separation is granted the respondent becomes the proven guilty party, and to permit him/her to get the marriage dissolved seems like rewarding a person for his/her fault. It is inequitable and contradictory to the spirit of provision of

[17] *Ibid.*
[18] As quoted by *Krishna Bahadur* in The Hindu Law of Marriage and Divorce, vol. V, p. 126.

Section 23 of the Hindu Marriage Act, 1955 which says that no person shall take advantage of his/her own wrong. It is submitted that the guilty party should not be allowed to get the marriage dissolved at his choice. It may be said that under certain unavoidable circumstances, the spouse may be compelled to obtain a decree for judicial separation, but he/she may not be interested in divorce. In India, where majority community considers marriage a *samaskar*, divorce should not be forced upon them unwittingly.

The Indian Divorce Act, 1869 enacted by British Parliament for regulating matrimonial relations among Indian Christians is outmoded and archaic. The original British legislation, the harbinger of the Indian statute, has undergone qualitative changes to accord equality to both spouses in matrimonial matters. But the Indian law has failed to keep pace with the change as was done in cases of Hindu and Parsi law. There have been recommendations from many quarters for changes in this discriminating law. The Supreme Court and High Courts have called upon the Parliament and State Legislatures to introduce changes in this law.[19] The Law Commission of India has recommended revamping of the Christian marriage and divorce legislation in its several reports. In its *Fifteenth Report on Law Relating to Marriage and Divorce amongst Christians in India (1960),* the Commission had made detailed recommendations for reform of Christian marriage and divorce laws As a result, the Law Ministry drafted a Bill and referred it back to the Commission for eliciting public opinion. On the public opinion being obtained, the Law Commission submitted its *Twenty-second Report on Christian Marriage and Matrimonial Causes Bill*

[19] *SC Selvaraj v. Mary,* (1958) 1 MLJ 289, *Ms. Jonden Diengdeh v. SS Chopra,* AIR 1985 SC 935.

1961, recommending a thorough revision of the existing legislation. Accordingly, a Bill entitled 'The Christian Marriage and Matrimonial Causes Bill' was introduced in Parliament in 1962. The Bill however, lapsed with the *Lok Sabha* being dissolved. Years later, the Law Commission in 1983 headed by K. K. Mathew had taken up *suo motu* the issue of revision of Section 10 of the Indian Divorce Act in view of sex-based discrimination applicable to Christians.

It is relevant to note that the Fifteenth and the Twenty-second Reports were prepared after collecting evidence from the dignitaries of the Christian Church represents of the Christian Associations. Members of Christian Community, Bar Association and judicial officers of the country. The Report would reveal that there was a demand from the Christian community itself for inclusion of the progressive grounds for divorce like cruelty and desertion which are available in almost all modern legislations on the subject.

In the Hindu society the custom of dowry has been prevailing since time immemorial. It has gradually become an evil. The social reformers have been trying their best to uproot it. Though dowry has no place in Islam, it has made inroads to the Muslim society of this subcontinent, as they too, form a part of the indigenous social texture. As back as 1940, Maulvi Aftab Ahmad of Bengal moved a Dowry Prevention Bill in the Bengal Legislative Assembly which, however, could not be enacted due to various reasons.[20] On independence, Indian Parliament passed the Dowry Prohibition Act in 1961, which was amended in 1984. It applies to all communities. In 1967 the Pakistan

[20] Pradyumma Arora; 'Pakistan: The Dowry and Bridal Gifts (Restriction) Act, 1976'. Islamic and Comparative Law Quarterly (Vol. II:1) 1982, p. 73.

Dowry (Prohibition and Display) Act was passed. The situation assumed so much an alarming proportion that the Dowry and Bridal Gifts (Restriction) Act, 1976 had to be legislated, followed by the Dowry and Bridal Gifts (Restriction) Amendment Ordinance, 1980. Bangladesh, too enacted a legislation in a bid to thwart this evil in 1980.

An approved marriage among Hindus has always been considered a *kanyadan.* The *Dharmashastra* also rules that this meritorious act is not complete till *dakshina* was given to the bridegroom. Father after decking his daughter with costly garments and honouring her by presents of jewels gifted her to a bridegroom whom he also presented in cash or kind known as *vardakshina.* Certainly whatever presents or gifts were given to the daughter constituted her *stridhan* or separate property. The ground reality is that the *vardakshina,* under no circumstances, constituted property of the bridegroom. Based on love and affection, the gift was completely voluntary in its origin and character. Later it assumed the frightening name of dowry, an inhuman coercive transaction

The Dowry Prohibition Act, 1961 did not prove effective. The evil continued to reign supreme. Several Indian states like West Bengal, Bihar, Orissa, Haryana, Himachal Pradesh, Punjab amended the act of 1961 in a bid to curb the evil by enhancing punishment for dowry offence, but with little success.

Later a Joint Parliamentary Committee was appointed to look into the problem which attributed two reasons to the failure of the Act, namely, the Act's exclusion of all presents, whether given in cash or kind, from

the definition of the dowry unless given in consideration of the marriage, and lack of effective enforcement machinery. Accordingly the Joint Committee made some recommendations. Parliament accepted some of them. These were incorporated in the Dowry Prohibition (Amendment) Act, 1984.[21]

In the Amended Act the words "as consideration for marriage", have been substituted by the words "in connection with the marriage" to widen the scope of definition. Two safeguards against the abuse of "presents" are laid down: (a) all presents made to the bride or bridegroom are to be entered in a list; and (b) such presents should be commensurate with the financial status of the giver.[22]

In the amended Act, too, the *mahr* or dower under the Muslim marriage continues to be excluded from the purview of definition of dowry. It makes the dowry offence cognizable and non-compoundable. The Joint Committee recommended that the dowry offence be tried by family court. However, it was not accepted. Likewise, the recommendation of the Joint Committee to appoint dowry prohibition officers went unheeded.

> *Pradyumna Arora observes: "The Pakistan Act of 1976, on the other hand, appears to be more realistic. It does not prohibit absolutely the giving and taking of dowry but, instead, put restriction on its quantum. For this purpose it groups 'dowry', 'bridal gifts' and 'presents' as separate transactions".*[23]

The Act is unique in one particular aspect. It bans absolutely receiving of the presents by state dignitaries, VIPs and high government officials

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[21] Paras Diwan: Notes & Comments, Dowry Prohibition Law, JILI (vol. 27: 4) 1985.
[22] Section 3(2)
[23] *Supra* note 19.

which will go a long way in cleansing public life of corruption and favouritism. The rules framed under the Act provide that such forfeited property shall be duly deposited in a *jahezkhana* to be made available to those who need help in their daughter's marriage. Thus the provision would act as a deterrent.

The monetary restriction on dowry, bridal gifts and marriage presents, and ceiling imposed by the Act on the total expenditure on marriage and related ceremonies would helpfully put an end to the ostentatious and wasteful expenditure on marriage. In order to achieve the desired results the Act provides that any person can make a complaint to the Deputy Commissioner within nine months from the date of marriage alleging that any provision of the Act has been violated.

In course of time dowry has become a widespread social evil. It has now assumed an alarming proportion. The cases of brides being beaten up starved and tortured for not having brought sufficient dowry are the usual feeds of our national dailies. In order to update the procedural aspect of the law, the Law Commission of India recommends as follows:

> *"(1) A provision as under should be inserted in the Indian Evidence Act, 1872:*
> *"where—*
>
> *(a) married woman dies, within five years of her marriage, of burns or injuries sustained by her in the house in which she and her husband were residing together immediately before the death, or from other cause of a similar nature, and the death takes place behind close door?, it may be presumed that the death was not accidental."*[24]

[24] Law Commission of India, Ninety-First Report (1983)

Surprisingly the evils of dowry have spread to the other communities which traditionally were not involved in this custom. The practice of giving and taking dowry is operating in the Muslim community in the guise and pretext of *jahez (dahez), salami,* and *neundra* of which our Indian legislation has no mention.

Suggestions

The following suggestions are advanced to resolve the problems:

1. In Chapter IV-A of the Constitution there is need for insertion of duty to honour woman. Also, the following amendment may be made in Article 51 A(k) — "Citizens of India shall have a duty to respect and honour a woman and renounce practices derogatory to the dignity of woman."

2. The term "woman" may be included in backward classes in Article 16 of the Constitution for their speedy upliftment.

3. Article 19 clause (2) must have a reasonable restriction that the man should not make any speech or expression which is derogatory to the dignity of woman.

4. Eight offences under Sections 294, 341, 342, 354, 397, 498, 509 of Indian Renal Code specifically mention that the court can either award imprisonment or fine or both. The Court has the discretion to award either of the two or both together. These offences are not grave by nature and provide maximum imprisonment upto one year or fine except in the case of two Adultery (Section 497) where the offender can either be punished with imprisonment which may extend to 5

years or fine or both. The discretion given to the Court does not appear reasonable and it is suggested that the Court should necessarily award imprisonment and also be authorized to impose fine. Similarly, in case of "enticing or taking away or detaining with criminal intent a married woman" (Section 498), fine should be imposed in addition to the punishment of imprisonment and not in lieu of imprisonment.

5. Looking to the far-reaching and highly dangerous consequences of the crimes against women, it is suggested that the punishment provided under Section 294 obscene act and songs in public place; Section 354 assault or criminal force to woman with intent to outrage her modesty; Section 498-A subjecting a woman to cruelty; Section 509 word, gesture or act intended to insult the modesty of woman is not sufficient and it must be raised. The punishment provided under Sections 376-B, 376-C, 376-D should be raised from five years to seven years equivalent to the punishment provided under Section 376 and the minimum punishment should also be prescribed because very often it has been seen that Public Servants, Superintendent of Jails or Remand Home, Member of Management Committees themselves indulge in crime against women. Minimum punishment should be laid down to prevent these law protectors from becoming law violators. If such persons abuse their positions, they must be strictly dealt with. Further, alike Section 376, some minimum punishment be prescribed for these offences

as an offence committed by public servants has more grave, pernicious and far reaching consequences.

6. In accordance with the Law Commission's Report (42nd, 1973) both man and woman should be punished for the offence of adultery under Section 497 of the Indian Penal Code.

7. Some provisions for compensation to rape victim must be made. This may be imposed as fine by the court on the accused. Section 376 may be amended accordingly.

8. The definition of minor as one under 16 years of age in rape law is arbitrary since elsewhere the legal definition is anyone upto 18 years. Therefore it must be amended accordingly as already pointed out by a committee set up by the National Commission for women in October, 1992.

9. If First Information Reports are not recorded by police in rape cases, then the police man concerned must be punished.

10. Provision relating to women (providing special protection to women) must be strictly followed by the authorities concerned.

11. The Court should have a provision in Section 468 that the cases relating to women (regarding offences committed against women) are decided at the earliest possible. The time limit of two years may be provided for such offences because justice delayed is justice denied.

12. The Supreme Court Judgment in *V. M. Arbat v. K. R. Sawai*[25] is a psychological blow to the women's crusade for economic independence and does not further the cause of women's right. Therefore, Section 125 of Criminal Procedure Code must specifically provide that married daughters are not under an obligation to maintain their parents. In exceptional cases, where the daughter is an earning member and without heavy responsibilities, she should be asked to pay maintenance to her parents.

13. "Special Family Courts" have become the need of the time. In some of the states these courts have started functioning though with little satisfaction. It is because of lack of required zeal and determined will, and further due to procedural drawbacks and set standards for the courts. They must be established without any further delay to deal with the offences against women only in every state. It is suggested that these courts should have at least a few female judges or atleast more than half of their total number. Further, the need for the availability of services of female prosecutors in such cases can not be denied.

14. The law insists that offence of Bigamy will be committed only when the second marriage is strictly proved. Anything short of second marriage will not amount to a bigamous marriage and accused is liable to be acquitted because the Act does not punish mock marriage *(Bhau Rao* v. *State of*

[25] AIR 1987 SC 1100

Maharashtra).[26] This appears to be serious lacunae in the Hindu Marriage Act, 1955, as only offence of bigamy has been made punishable in the Act read with Sections 494 and 495 of Indian Penal Code. Similar provisions would have been made for mock marriages. The illegitimate children have not received a fair treatment in the Act, as is conferred to them in other countries which treat their responsibility to take care of such children. A new trend is visible in the present century that people in cosmopolitan cities to have children without marriage by virtue of living relationship. The present law is insufficient to take care of such children who are born without a legal wedlock of their parents.

15. The provision regarding registration of the marriage under Section 8 of the Hindu Marriage Act should be made compulsory and all the Revenue officers, Sarpanchas, Patwaries should be authorized to keep marriage register for the same, so that the chances of fraud and mock marriages could be checked and detected.

16. The Revenue Officers, *Sarpanchas, Patwaries, Chowkidars* of the villages and neighbour of the offender (of bigamy) must have a "legal duty to inform the police or the Court about the second marriage of the persons". It may not be expected only from the first wife to bring an action against the husband, but any other person can put the law in motion for bigamous marriages.

[26] AIR 1965 SC 1564: 1565 (2) Cr. L.J. 544.

17. A reasonable restriction should be imposed on the testamentary power of a Hindu male who wants to disturb the usual line of inheritance.

18. For giving equal rights to females, the differences between agnates and cognates to inherit the property of a male Hindu should be abolished.

19. The property of a female 'Hindu is divided for purpose of succession into three classes which is not justifiable. It shows a retrogressive step. Therefore, it must be reviewed and distinction must be abolished. The law of inheritance of Hindu female's property requires a thorough review.

20. The remaining uncodified Hindu Law pertaining to Joint Family, partition, religious endowment etc. should be brought into statutes book. A central legislation on the subject is the need of the day.

21. In case of adoption by an unmarried mother, mother's name should be recognized as parent's name for all purposes.

22. In case of the death of husband, parents of the widow should be the guardians of the widow in place of the in-laws.

23. Mother and father both must be recognized as natural guardians of the child to ensure the welfare of the child.

24. As per provisions of the Dowry Prohibition Act, 1961, the giver and the taker of the dowry are punishable. As a result, complaints for dowry extortion are not being lodged. Hence,

the persons giving dowry should be excluded from liability.

25. The Maternity Benefit Act, 1961 was enacted with the object of bringing uniformity in regard to maternity benefits available to women workers. However, certain anomalies still exist which should be taken care of by the legislature. Firstly, the Maternity Benefit Act, 1961 applies to every establishment which is a factory, mine or plantation including those belonging to the Government. It also applies to every establishment where equestrian, acrobatic and other similar acts are performed and exhibited. The Employees State Insurance Act, 1948, on the other hand, applies, to all factories including factories, belonging to the Government but excluding seasonal factories. By Section 2 (2) of the Maternity Benefit Act, 1961 it has been clarified that this Act shall not apply to any factory or other establishment to which the provisions of the Act are applicable excepting the woman who is covered under section 5-A of the Maternity Benefit Act. An insured person under the Act, 1948, is entitled to get maternity benefit provided the employee has made at least thirteen weekly contributions which must be continued for the purpose of availing this maternity benefit in future. A woman worker under the Maternity Benefit Act is entitled to get maternity benefit without making any such contribution but she should fulfill the requisite condition of having worked in the establishment of the employer at least for one hundred and sixty days during the twelve months preceding immediately before the date of her expected delivery. No

such condition is prescribed under the Employee's State Insurance Act, 1948.

26. Under the Maternity Benefit Act a woman worker resuming duty after child birth is entitled to get two nursing breaks of the prescribed periods for taking care of her child under Section 11 of the Act till the child attains the age of 15 months. This provision has been made with the object to provide facility to the woman to take care of her child so that the child may enjoy and have good health. There is, however, no such provision under the Act.

27. The employer under Section 4 of the Maternity Benefit Act, 1961, cannot compel a pregnant woman to do any work of arduous nature which requires standing for many hours or which is likely to interfere with her pregnancy or adversely affect her health within a period of seventy-two days from the date of her delivery. The employer cannot make any deductions for giving the women workers easy or less arduous work. No such provision exists in the Employees State Insurance Act.

Thus in view of the above disparities a woman worker getting benefits under the Act finds herself in a disadvantageous position in comparison to a woman covered under the Maternity Benefit Act. It is, therefore, suggested that the position should be rationalized and brought at par to the maximum possible extent by making suitable amendments in the Employees' State Insurance Act.

28. The existing provision that no woman shall be entitled to any maternity benefit unless she has actually worked in an establishment for a period of not less than 160 days during the twelve months immediately preceding the date of her expected delivery is quite unreasonable. The service of only three months is sufficient to qualify even casual woman labour for this benefit. The Act should also cover agricultural labourers.

29. There should be effective implementation of the Maternity Benefit Act in all States. The provisions contained in Section 12 with regard to dismissal due to absence during pregnancy should be scrupulously implemented. Stringent penalties should be imposed for the violation of the Act.

30. Lastly, the piecemeal protection provided under different labour legislations[27] has failed to protect the legitimate interests of female workers. It is suggested that a comprehensive legislation providing productions to female workers employed in different establishments should be enacted so that their legitimate rights are duly protected.

31. The National Commission for women should review the Hindu Marriage Act, the Hindu Succession Act, the Hindu Adoption and Maintenance Act and the Hindu Minority and Guardianship Act and other concerned laws.

32. The State must come forward to encourage the remarriage of divorcees and victims of rape.

[27] The payment of Wages Act, 1936 Bonded Labour System (Abolition) Act, 1976, Mines Act, 1952, Employment of Children Act, 1938, Factories Act, 1948, The Merchant Shiping Act, 1958, Bedi & Sigar Workers (Conditions of employment) Act, 1966, The Motor Transport Workers Act, 1951, The apprenticers Act, 1961, The Plantation labour Act, 1951, etc.

33. Government must provide free legal aid to dowry victims.

34. Anti-dowry study material must be inserted in School curriculum.

35. Mere protective benevolent legislation is not enough. To bring social awareness women organizations should work more promptly and actively. The State must give priority to education to all. Education upto 12 standards must be made compulsory and free of cost for women. Such education system should compulsorily transmit primary legal education to women. Various enactments relating to Hindu women and other related laws e.g. the Dowry Prohibition Act, must be taught to Hindu women.

The position of Christian women appears to be nearly satisfactory due to higher percentage of literacy, progressive views and open mind attitude. They are enjoying more liberty in action; freedom in choice of job and protection through law. The minority protection clause in the Constitution also helps her in securing freedom and equal treatment like any other women. But many changes are required in the laws applicable to them for actual amelioration.

Parsi women suffer from two major setbacks namely.

1. That their stringent law does not permit inter caste marriages.
2. Discriminatory treatment is meted out to them in matter of holding and succeeding the property.

It is hoped that the existing Parsi Law will be changed in course of time to bring it in tune with Indian democratic norms.

It appears that the empowerment of women in the area of personal

laws through legislations differs personal law to personal law. Hindu Personal law after the commencement of the Constitution of India has witnessed improvement ensuring gender justice and over all empowerment. In Christian matrimonial laws the pace of empowerment is quite poor and there is need to improve the situation taking into account the egalitarian philosophy of the constitution of India, however, in the area of property matter there is no objectionable provision. Parsi personal law has improved itself ensuring empowerment of women. Under Muslim Personal Law to empower women still a lot to be done yet in India.

Indian Muslim women have not been able to come up to catch the fast march of progress as compared to women belonging to other communities especially Hindus, Christians and Parsis because they are lacking enlightened leadership and also due to extra care of religious and cultural identity which is based on orthodoxy. They are in need of empowerment especially in area of their personal laws affecting their matrimonial and property matters. In post-independent India legislative outcome in this area is quite minimal. They are also not much organized as they are not having dominant and influential organizations for pushing the matter of empowerment as other communities women organizations are doing very effectively. Researcher points it out this aspect whenever relevance is sensed in process of expanding the thesis. Also, researcher is of the view that to satisfy the essence of empowerment reforms in Muslim Personal Laws are immensely needed taking into account fast changing pattern of society sharing the trends of the Muslim world respecting the primary sources of Islamic Jurisprudence. Muslim Personal Law Board is only organized institution and it comprises enlightened Muslim leadership

alongwith experts in different area of knowledge who can contribute meaningfully and constructively for the empowerment of Muslim Women in the area of Muslim Personal Law. This Board has been urged to come forward taking up the agenda of empowerment of Muslim women in the area of personal laws.

An encouraging development in all these years is the growth of organized articulation of women's problem by women organizations. There has been a rapid growth in Women's organizations to protest against crimes of violence against women, against the institution of dowry, against discrimination in employment and economic status and the like. While many new women's organizations sprang up, older, more established organizations also become more active. All these organizations have displayed new capacity to take up women's problems, concerns and issues at different fora-media, political parties, law, academia, the bureaucracy and other professions cutting cross the sex and caste considerations.

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133. *Titli v. Alfred*, AIR, 1934, All. 274

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1. Relevant extract from C.P.C., 1908
2. Relevant extract from Cr.P.C., 1973
3. Relevant extract from I.P.C.. 1860
4. Relevant extracts from Evidence Act, 1872
5. The (Mysore) Hindu Law (Women's Rights) Act, 1933
6. The (Orissa) Mohammedan Marriage and Divorce Registration Act, 1949
7. The Anand Marriage Act, 1909
8. The Arya Marriage Validation Act, 1937

9. The Bengal Mohammedan Marriage and Divorce Registration Act, 1876
10. The Caste Disabilities Removal Act, 1850
11. The Child Marriage Restraint (Amendment Act), 1978
12. The Child Marriage Restraint Act, 1929
13. The Commission of Sati (Prevention) Act, 1987
14. The Constitution of India, 1950
15. The Converts' Marriage Dissolution Act, 1866
16. The Cutchi Memons Act, 1938
17. The Dissolution of Muslim Marriages Act, 1939
18. The Dowry Prohibition (Amendment) Act, 1986
19. The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985
20. The Dowry Prohibition Act, 1961
21. The Family Courts Act, 1984
22. The Foreign Marriage Act, 1969
23. The Foreign Marriage Rules, 1970
24. The Guardian and Wards Act, 1890
25. The Hindu Adoptions and Maintenance Act, 1956
26. The Hindu Disposition of Property Act, 1916
27. The Hindu Gains of Learning Act, 1930
28. The Hindu Inheritance (Removal of Disabilities) Act, 1928
29. The Hindu Law of Inheritance (Amendment) Act, 1929
30. The Hindu Maniac (validity) Act, 1949
31. The Hindu Marriage Act, 1955

32. The Hindu Marriage Disabilities Removal Act, 1946
33. The Hindu Marriages (Validation of Proceedings) Act, 1960
34. The Hindu Minority and Guardianship Act, 1956
35. The Hindu Succession Act, 1956
36. The Hindu Widows' Re-marriage Act, 1856
37. The Hindu Women's Right to Separate Residence and Maintenance Act, 1946
38. The Indian Christian Marriage Act, 1936
39. The Indian Contract Act, 1872
40. The Indian Divorce Act, 1869
41. The Indian Majority Act, 1875
42. The Indian Matrimonial Causes (War Marriages) Act, 1948
43. The Jammu and Kashmir Hindu Marriage Act, 1980
44. The Kazis Act, 1880
45. The M.P. Prevention of Hindu Bigamous Marriage Act, 1955
46. The Madras Marumakkatayam Act, 1932
47. The Marriage Laws (Amendment) Act, 1976
48. The Marriages validation Act, 1892
49. The Maternity Benefits Act, 1988
50. The Medical Termination of Pregnancy Act, 1971
51. The Muslim Personal Law (Shariat) Application Act, 1937
52. The Muslim Women (Protection of Rights on Divorce) Act, 1986
53. The National Commission for Women Act, 1990
54. The Parsi Marriage and Divorce (Amendment) Act, 1988

55. The Parsi Marriage and Divorce Act, 1936
56. The Rules of High Courts
57. The Special Marriage (Amendment) Act, 1963
58. The Special Marriage Act, 1872
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3. Criminal Procedure Code, 1973
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